Supreme Court, U.S.
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No. _____

In The
SUPREME COURT
OF THE
UNITED STATES

October Term, 2002

KENN GOLDBLATT
Petitioner,
v.
A&W INDUSTRIES, INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

I.

DOES A STATE COURT'S PERMANENT INJUNCTION OF A PROPERTY OWNER IN FAVOR OF A TENANT AT SUFFERANCE AMOUNT TO AN UNLAWFUL TAKING DEPRIVING THE OWNER OF HIS PROPERTY?

II.

DOES A STATE TRIAL COURT'S ERROR IN APPLYING STATE LAW TO ESTABLISHED FACTS CONSTITUTE A VIOLATION OF A LITIGANTS CONSTITUTIONAL DUE PROCESS RIGHTS?

III.

DOES A STATE COURT'S FAILURE TO PROPERLY IDENTIFY CONTINGENCIES AND/OR AN UNENFORCEABLE "AGREE-MENT TO AGREE" AMOUNT TO AN ABUSE OF DISCRETION VIOLATING A LITIGANT'S CONSTITUTIONAL RIGHTS?

IV.

DOES A STATE TRIAL COURT'S FAILURE TO FIND ALL ELEMENTS OF A CIVIL TORT REQUIRED UNDER THAT STATE'S LAWS VIOLATE A LITIGANT'S CONSTITUTIONAL DUE PROCESS RIGHTS?

LIST OF PARTIES

Appellant certifies that the following persons may have an interest in the outcome of this case:

1. Kenneth A. Goldblatt, Petitioner.

2. Frank P. Hernandez, Petitioner's Counsel of Record.

3. A & W Industries, Inc., Respondent.

4. Paul F. Wieneskie, Respondent's Counsel of Record.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TO THE UNITED STATES SUPREME COURT:

Kenn Goldblatt (hereinafter "Goldblatt") petitions for a *writ of certiorari* to review, reverse and/or remand the judgment of the Supreme Court of Texas wherein Goldblatt's assertions of various U.S. Constitutional claims have been erroneously denied by abuses of discretion of the state courts of Texas resulting in significant deprivations of his rights of contract, due process, equal protection and constitutional property rights.

OPINIONS BELOW

On May 27, 1997 the Probate Court No. 2 of Tarrant County, Texas decided by summary judgment that Goldblatt's foreclosure of a pre-existing 1985 mortgage note cut off all claims by A&W to purchase the subject real estate. Almost two years later, on July 28, 1999, the

trial court issued its oral rendition of judgment reaffirming Goldblatt's foreclosure. Ten months later, on May 30, 2000, the trial court signed its written Judgment and Findings of Fact and Conclusions of Law.

Goldblatt timely appealed the Judgment to the Court of Appeals of the Second Judicial District of Texas in which he raised Federal Constitutional issues that are the subject matter of this Writ. The appeals court issued its Opinion on July 18, 2002 affirming the original judgment and denied motions for Rehearing and Rehearing in Banc thereafter.

Goldblatt then timely appealed to the Supreme Court of Texas which denied his Petition for Review on March 27, 2003 and denied his Motion for Rehearing on May 15, 2003.

JURISDICTION

This Court has jurisdiction of this appeal under Supreme Court Rule 10, the Unreasonable Search and Seizure Clause of the Fourth Amendment, the Just Compensation Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Contracts Clause of the U.S. Constitution.

STATEMENT OF THE CASE

This is a breach of contract and conspiracy case with a complicated procedural history. A&W Industries, Inc. ("A&W") alleged that Goldblatt and others 1) conspired to breach a provision ("Section 28") of a commercial lease agreement ("Lease") obligating A&W to purchase real estate in Grapevine, Texas (the "Property"), and 2) conspired after the breach to void a precursor Agreement for the Acquisition of Assets ("the Agreement").

COURSE OF PROCEEDINGS BELOW

The trial court ruled by 1997 Summary Judgment that Goldblatt's 1994 foreclosure of a 1985 mortgage note cut off all A&W rights to purchase the Property. In 2000, the trial court granted A&W breach of contract damages against various parties and entities declaring that those individuals and entities conspired to breach the contract to prevent A&W from purchasing the Property and to void the precursor asset sale Agreement. It also granted A&W a permanent injunction preventing Goldblatt from asserting any ownership rights over the Property in direct contradiction of more than a century of settled Texas law. The trial court refused to set aside Goldblatt's property ownership and denied A&W a constructive trust because A&W lacked "clean hands."

In its Findings of Fact and Conclusions of Law, the trial court failed to find essential elements of fraud or civil conspiracy required by law. It also misapplied law of contracts regarding agreements to agree, family settlements, agreements in defense of claims, and other well settled teachings of Texas law to the facts in multiple and material abuses of discretion.

After its plenary power expired – and after the appeals court had specifically denied a Writ of Prohibition to A&W to prevent an eviction suit filed by Goldblatt, the trial court unlawfully cited Goldblatt for contempt of its permanent injunction and issued such a writ of prohibition.

Goldblatt filed a Writ of Mandamus to reverse the contempt sanction. The appeals court found that the trial court lacked jurisdiction for its hearing, but erroneously left other actions taken at the void contempt hearing in place.

Thereafter, the appeals court compounded the trial court's errors, affirming the Judgment by impermissibly

"implying" facts not found by the trial court in direct contradiction of Texas Supreme Court authorities.

Goldblatt filed Petition for Review and Motion for Rehearing by the Texas Supreme Court which were denied.

STATEMENT OF THE FACTS

In 1985, Wilbert of North Texas, Inc.'s ("WNT") business assets and real estate in Grapevine, Texas ("the Property") were mortgaged to Landmark Life Insurance Company ("Landmark"). In 1989, WNT employed Frank McCown ("McCown") to file suit in the 352nd court against a sister-in-law, Shirley Long ("Long") over ownership of WNT capital stock and its real estate (App. G-3).

On June 16, 1990, the WNT's president and owner was murdered. His executors, James Day ("James") and Ramona Day ("Ramona") were substituted as plaintiffs in the 352nd suit (App. G-3).

The executors employed separate legal representation (App. G-3). Both sets of lawyers told the executors that WNT would have to be sold to pay estate taxes (App. G-4). The representations were false (App. G-4, fn. 2). At the lawyers' direction, the executors signed a Consent of Shareholders and Directors ("the Consent") to allow transfer of WNT's assets to A&W, during September and October, 1991 (App. G-6). McCown began simultaneously representing WNT and A&W principals without disclosing his conflict to the Executors.

As part of the Agreement for the Sale of Assets (the "Agreement"), A&W also entered into a Commercial Lease Agreement (the "Lease") with WNT (App. G-6-7). The Lease contained a provision entitled "Obligation to Purchase" ("Section 28") (App. G-6) in which A&W

agreed to purchase the Property for $327,000.00. Section 28 stated in part that:

> If at any time during the term of this Lease Lessor is able to deliver clear fee simple, indefeasible title to the Leased Premises, it shall notify Lessee in writing and shall provide Lessee with a title commitment issued by a title company acceptable to Lessee, containing no exceptions to title other than such exceptions as may be approved by Lessee. Upon delivery and receipt of such title commitment, Lessee shall be obligated to purchase the Leased Premises from Lessor, and Lessor shall be obligated to sell the Leased Premises to Lessee. In such event, the price payable by Lessee for the Leased Premises shall be Three Hundred Twenty-seven Thousand Dollars ($327,000), with closing to occur within sixty (60) days after delivery of the title commitment; however, in the event that Lessee believes that the value of the Leased Premises has decreased, it shall notify Lessor within thirty (30) days after receipt of the title commitment that it desires to have the Leased Premises appraised. Lessor and Lessee shall attempt to agree upon an appraiser, whose decision shall be final and binding on all parties. If Lessor and Lessee are unable to agree upon an appraiser within fifteen days after such notice, Lessor and Lessee shall each appoint an M.A.I. appraiser and shall notify the other party of the appointment within ten (10) days after the expiration of the fifteen day period. . . . If both Lessor and Lessee appoint an appraiser in accordance with the provisions hereof, and the two appraisers cannot agree upon a value for the Leased Premises within thirty (30) days upon appointment of the last of them, the two appraisers shall appoint a third disinterested and qualified M.A.I. appraiser

> and each of the two original appraisers will immediately submit his opinion as to the value of the Leased Premises in writing to the third appraiser. Within ten (10) days after such submittal, the third appraiser shall make a determination of the value of the Leased Premises and the determination of the third appraiser shall be final and binding upon all parties. In the event the two original appraisers cannot agree upon a third appraiser, then the third appraiser shall be appointed by the then President of the North Texas Society of Industrial Realtors (or its successor organization). Lessor and Lessee shall each bear the expense of the appraiser appointed by them, and the expense of the third appraiser, if necessary, shall be shared equally by both parties. The closing of the sale and purchase shall occur within thirty (30) days after the final determination of the appraised value of the Leased Premises, and the price payable by Lessee at the closing shall be the lesser of Three Hundred Twenty-seven Thousand Dollars ($327,000), or the appraised value. . . .

In December 1992, the 352nd suit ended through an Agreed Judgment that granted "the plaintiffs" ownership of the WNT capital stock and title to the Property. In February 1993, McCown obtained a title commitment that showed title in Indian Villages, Inc. ("IV"). McCown took no action to clear the title (App. G-10, fn. 4).

In September 1993, McCown notified James he could no longer represent WNT and the executors because he had represented A&W and its principals (App. G-11-12). About the same time, A&W offered $95,000.00 to purchase the Property (App. G-10-11). The Executors rejected the offer and demanded that their remaining attorneys explain the $230,000.00 price reduction. When

explanations were not forthcoming, James halted the sale process on November 27, 1993 (App. G-12).

In December 1993, Landmark posted the Property for foreclosure. James was able to postpone the action, but on February 7, 1994, Landmark again posted the Property for foreclosure sale in March 1994 (App. G-13).

James then contacted Kenn Goldblatt ("Goldblatt"), a long-time friend and former student for assistance in discovering what caused the default (App. G-13).

James soon asked Goldblatt to prevent Landmark's foreclosure. On February 28, 1994 Goldblatt purchased the Landmark note to give the Executors more time to investigate the circumstances of the asset sale (App. G-13-14). On March 1, 1994, Goldblatt renewed and extended the note (as the original lender had done) to allow the balance to be paid out of Lease revenue (App. G-14).

In March 1994, Long filed suit in the 48th court for breach of the 352nd Agreed Judgment. Goldblatt did not know Long, was not a party to the suit, and did not participate in any way.

On March 28, 1994, A&W filed suit against WNT, the executors and Goldblatt in the 141st court (App. G-14). On or about April 7, 1994, Goldblatt discovered he was a defendant in the 141st suit and immediately began investigating A&W's allegations. By May 30, 1994, Goldblatt negotiated an agreement with all parties involved in the 352nd suit and the Estate's adult heirs (App. G-13). The execution and ratification of this Family Settlement Agreement established the first period of "legal peace" for the family members in over five years. On June 2, 1994, Long obtained a summary judgment because the terms of the 352nd judgment had been breached (App. G-14).

James was advised by his new counsel not to cash A&W's rent checks to avoid waiving WNT's counter-

claims for breach of the Lease. Because the Estate had no other funds, the mortgage again went into default (App. G-14). Goldblatt foreclosed on June 7, 1994 (App. G-17).

On May 27, 1997, the trial court found by Partial Summary Judgment that the foreclosure cut off A&W's claims to purchase the Property. (App. A) On May 11, 2000, the trial court signed its Judgment in favor of A&W but left Goldblatt's property ownership intact (App. C-7).

REASONS FOR GRANTING THE WRIT

The state courts have repeatedly and materially erred in applying state and Federal law to the facts of this case. The unlawful actions of the courts below and their conscious disregard of the guiding principles have resulted in an unlawful taking of Goldblatt's Property for the benefit of a private interest.

The trial court declared Goldblatt to be the lawful owner of the property by Summary Judgment and refused to set that ruling aside in its final Judgment. But in direct conflict with those rulings, the trial court granted A&W a permanent injunction preventing Goldblatt from possessing, using, managing or controlling the Property in violation of Goldblatt's Constitutional rights.

The appeals court Opinion, flawed by multiple errors of fact and internal conflicts of logic, attempted to justify the trial court's original errors by further abuses of discretion. It refused to set aside the unlawful permanent injunction or address Goldblatt's constitutional due process and property rights claims. Goldblatt raised these issues in a Motion for Rehearing that was denied.

The Supreme Court of Texas similarly denied Goldblatt's Petition for Review and Motion for Rehearing.

These cascading abuses of discretion by the state courts resulted in an avalanche of errors amounting to in an unauthorized taking of Goldblatt's property by court

action for the benefit of a private party in violation of his due process rights. For these reasons, this writ should be granted.

STANDARD OF REVIEW

A court necessarily abuses its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. This single-tier formulation of the abuse of discretion standard of review has been adopted in numerous contexts on both state and Federal levels and is applicable here. See, e.g., *Koon v. United States*, 116 S. Ct. 2035, 2047-48 (1996). A trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); cf. *Koon v. United States*, 518 U.S. 81, 100 (1996) (adopting a single-tier formulation of the abuse of discretion standard of review). "A district court by definition abuses its discretion when it makes an error of law." *Id.*

SUMMARY OF ARGUMENT

A&W's entire claim against Goldblatt rests on a commercial lease agreement to which Goldblatt was never a party, and that was breached by the courts' own reckonings months before Goldblatt was ever involved in the case. Section 28 included contingencies that were never met or triggered and was never more than an uneenforceable "agreement to agree." Neither the trial record nor the trial court's Findings of Fact and Conclusions of Law supports the Judgment. Evidence adduced at trial confirmed that Goldblatt: 1) was never involved in the 352nd suit; 2) was contacted by James and purchased the subject mortgage note months after the breach of Section 28; 3) was not involved in the 48th court suit; 4) participated in the agreements of May 30, 1994 only ***after*** he was sued by A&W, and 5) properly and

validly foreclosed the lawfully purchased Landmark note. In short, Goldblatt was not involved in any alleged conspiratorial action. Despite these facts existing on the record, the trial court found that Goldblatt was the owner of the Property, but issued a permanent injunction preventing Goldblatt from possession, use or enjoyment of the Property. Goldblatt cannot find a single precedent in Texas or Federal jurisprudence to justify the court actions.

ARGUMENT

I.

DOES A STATE COURT'S PERMANENT INJUNCTION AGAINST A PROPERTY OWNER IN FAVOR OF A TENANT AT SUFFERANCE AMOUNT TO AN UNLAWFUL TAKING DEPRIVING THE OWNER OF HIS PROPERTY?

Goldblatt cannot find an applicable case in Texas, any Federal circuit, or this Court in which a property owner has been permanently enjoined from the use and enjoyment of his own property in favor of an unwanted tenant at sufferance.

This Court has declared that in a taking analysis: "[It] is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States v. Cress*, 243 U.S. 316, 328 (1917); *United States v. Causby*, 328 U.S., at 266. See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 22 S.Ct. 1465, 152 L.Ed.2d 517 (2002)

The only case Goldblatt has been able to identify in which a landowner has been enjoined from evicting tenants is *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961). There, the Federal courts enjoined landowners from evicting Negro sharecroppers who were using the evictions

to prevent the tenants from registering to vote. Thus, *Beaty* is clearly inapposite. Goldblatt can find no other cases.

In *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), the court found that the ripeness of an applied arbitrary and capricious due process claim depends upon the nature of the claim, saying:

> We can conceive of an arbitrary and capricious due process claim in which the final decision requirement would be satisfied with a single arbitrary act. For example, if a landowner's initial application for commercial zoning had been rejected at a preliminary stage simply because the landowner was a redhead, the landowner's arbitrary and capricious due process claim challenging that action would be ripe. That decision can be immediately challenged because the arbitrary and capricious act has been applied to him. However, the remedy for the mere rejection of the redheaded landowner's application would not be an injunction requiring a grant of commercial zoning, but rather would be the overturning of the arbitrary decision, possibly an injunction against similar irrational decisions, and other remedies depending on the situation.

In this case, Goldblatt does not merely challenge the irrationality of the injunction. Rather, he asserts that he was arbitrarily denied use and enjoyment of land that the trial court declared that he owned – land over which the trial court specifically denied A&W a constructive trust. And he has incurred significant damages as a result.

The *Eide* court found that an arbitrary and capricious due process claim is not ripe until the decision challenged has been finally made as to the property. That circumstance occurred when the Texas Supreme Court denied review.

The Texas Supreme Court most recently expressly precluded injunctions preventing a person from occupying his own land in *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). The *Walker* court held: "For nearly a century, Texas courts have recognized as settled law that to enjoin one from trespassing upon land, the right of possession of complainant must be superior to that of him against whom the relief is sought." The trial court's Partial Summary Judgment signed May 27, 1997 (App A), the trial court's rendition (App. B-118) and A&W's own judicial admissions that Goldblatt owns the Property, establish Goldblatt's superior property rights.

An Original Proceeding in the appeals court by A&W for a Writ of Prohibition against the justice of the peace hearing Goldblatt's eviction suit was denied. Yet, the trial court later issued such a Writ of Prohibition. (App. E-2-3) The appeals court then granted Mandamus but illogically ruled that although the trial court did not have jurisdiction to hold the hearing, Goldblatt should refrain from further eviction actions. (App. F-6).

For more than a century in Texas, the courts have refused injunctions to restrain justice of the peace eviction suits on the ground that plaintiff had no title to the land, or possession, or right to possession. *Chadoin v. Magee* 20 Tex. 476, (1857). The injunction issue, as declared by the trial court (App. E-2) and affirmed by the appeals court (App. G-84) was raised to the Texas Supreme Court as a violation of Goldblatt's constitutional property rights.

The Judgment permanently enjoined the Goldblatt and the aligned parties from:

> directly or indirectly interfering in any way with the business and operation of A&W Industries, Inc., or the real or personal property of A&W Industries, Inc., including the leased property located at 827

Dawn lane, Grapevine, Texas, and from pursuing further claims against A&W Industries, Inc., Bert George, Sherry Rountree, John C. Applewhite, or their attorneys, that are in any way related to the. ownership or operation of A&W Industries, Inc. d/b/a Wilbert of North Texas. (App. C-6)

The injunction does not expressly prohibit Goldblatt from bringing suit to protect his own property. But the trial court found him in contempt and sanctioned Goldblatt for bringing suit in the justice court after A&W failed and refused to pay rent (App. E-2).

No lease has ever existed between A&W and Goldblatt. The WNT-A&W Lease was breached in 1993 before Goldblatt became involved. Goldblatt's foreclosure in June 1994 cut off the Lease as a matter of law. The Lease expired by its own terms in October 1996. The Order of Contempt is dated November 2000. (App. E-3)

As part of the state courts' cascading abuses of discretion, Goldblatt was been prevented from 1994 by A&W's litigation from taking possession of the Property by a temporary injunction of the trial court. A 1999 change in the Texas homestead law has since been used to justify denying Goldblatt's Business Homestead designation of the Property. Such actions are an unlawful, *ex post facto*, retroactive application to facts existing under prior law. *Cockrum v. Johnson*, 934 F.Supp. 1417 (N.D.Tex 1996) ***A statute which has "retroactive effect,"*** meaning it impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed, ***does not apply to cases pending at time of its enactment.*** [emphasis added] Such retroactive application is also impermissible under Article I, section 16 of the Texas Constitution which provides that "[n]o ... retroactive law ... shall be made."

Retroactive application of a law is unconstitutional if it destroys or impairs a vested right. [emphasis added] *Grocers Supply Co. v. Sharp*, 978 S.W.2d 638, 643 (Tex.App.- Austin 1998, pet. denied). *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex.,1996) Vernon's Ann.Texas Const. Art. I, § 16. Yet the courts of Texas have ignored Goldblatt's constitutional property claims (See App. G-83-84).

A violation of substantive due process occurs when the government deprives someone of liberty or property; or when the government works a deprivation of a constitutionally protected interest. *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988); see also *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995).

The Fifth Circuit held in *Simi Investing Company, Inc. v. Harris County Texas* that "[I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrary or capricious." The *Simi* court found "illegitimate governmental conduct that . . . deprived Simi of its property rights for the benefit of private interests." *Simi Investing Company, Inc. v. Harris County Texas*, 236 F.3d 240, 249 (5th Cir. 2000) cert. denied.

In its *Simi* Opinion on Petition for Rehearing En Banc, the Fifth Circuit stated that:

> "In the majority of cases involving landowner complaints, substantive due process is not the appropriate avenue of relief. Our Takings Clause jurisprudence cannot be circumvented by artful pleading of substantive due process claims. Except in the rare cases of deprivations of property based on, for example, illegitimate and arbitrary

governmental abuse, vague statutes, or retroactive statutes, the takings analysis established by the Supreme Court and this circuit should control constitutional violations involving property rights that have been infringed by governmental action." 256 F.3d 323, 324 (5th Cir. 2001).

Simi is the law of this case. Goldblatt continues to be irreparably damaged by being illegally deprived of his use, ownership and possession of his Property for the benefit of an opposing private interest.

II.

DOES A STATE TRIAL COURT'S ERROR IN APPLYING STATE LAW TO ESTABLISHED FACTS CONSTITUTE A VIOLATION OF A LITIGANTS CONSTITUTIONAL DUE PROCESS RIGHTS?

It is generally held that the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. *Union Tool Co. v. Wilson*, 259 U.S. 107, 112, 42 S. Ct. 427, 66 L. Ed. 848. Misapplication of law to the facts is in itself an abuse of discretion. *Hanover Star Milling Co. v. Allen & Wheeler Co.*, 7 Cir., 208 F. 513, 523. *Clemons, et al. v. Board of Education of Hillsboro, Ohio, et al.*, 6 Cir., 228 F.2d 853, 857.

The appeals court fundamentally erred in its analyses of the May 30, 1994 agreement saying:

"The family settlement doctrine does not apply here because none of the parties to the May 1994 agreement were beneficiaries of Tommy's will. . . . These appellants' arguments also fail . . . because they and the other appellants conspired to use and did use the May 1994 agreement as a means to perpetuate a fraud on the 48th District Court in order to avoid WNT's contract with A&W." (App. G-32)

This factually incorrect conclusion by the appeals court was patently evident from the record. All adult heirs' notarized ratifications were attached to the trial exhibit. The 48th suit was not referenced in the agreement, and the agreement was not referenced in the 48th suit. The agreement recited the fact that A&W had filed suit against the Estate, and that the Estate and WNT had been harmed by their fiduciaries.

Similarly, the lower courts' acceptance of A&W's claim that the 48th judgment was obtained by fraud is illogical and incorrect. When a trial court's order granting summary judgment does not specify the grounds relied on for its ruling, summary judgment will be affirmed on appeal in Texas on any meritorious theory advanced. See *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989) and *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989) When or if the properties were lost to Shirley was irrelevant to the appellate court's recognition that the deeds were not timely delivered and the money judgment against Long was not released (App. G-28). The appeals court found that because A&W was not a party to the 48th suit, it was not affected by its judgment. (App. G-70 and 72, fn. 18) It is, therefore, impossible that A&W sustained damages from that judgment.

The irrationality of the Texas courts' applications of the law to the facts is established by the numerous inconsistencies of the Opinion affirming the judgment while manifesting numerous conflicts. To wit:

1. Section 28 required WNT to deliver "fee simple, indefeasible title." The Opinion acknowledges that "The record indicates, however, that this cloud was not removed." (App. G-10) This appeals court finding shows unequivocally that the contingencies of Section 28 did not occur and that no contract for the sale of the real estate

ever formed. The existence of a contingency clause does not prevent the contract from being a true contract for the sale of land. But the contract is not enforceable and binding until the condition is met. *Knox v. Townes*, 470 S.W.2d 290, 292 (Tex.Civ.App.-Waco 1971, no writ); *Zeluff v. Ekman*, 386 S.W.2d 838, 841-842 (Tex.Civ.App.-Houston 1965, no writ). Until the condition is met or discharged, neither the forfeiture of escrow clause nor the conveyance and payment terms of the contract come into play *Willeford v. Walker*, 499 S.W.2d 190, 192 (Tex.Civ.App.-Corpus Christi 1973, no writ). The Opinion's recognition that "the cloud was not removed" shows that WNT was never able to offer the Property.

B. "We hold that A&W's allegations are sufficient to plead a fraud upon the court, which is an actionable unlawful act for which appellants could be held liable." (App. G-24) The Opinion relies on a case in which plaintiff and defendant agreed to take a sham judgment. But the appeals court found that that was NOT the case in the 48th judgment when it opined that "The record supports Shirley's allegation about the abstract of judgment" (App. G-28). This recognition unequivocally establishes Shirley's probable cause and legal justification. Further, A&W's "allegations" were irrelevant because A&W was not a party to the suit and not bound by it (App. G-71).

C. The appeals court adopted A&W's speculative, tortured, incorrect and irrelevant interpretation of the 352nd judgment terms regarding delivery of the deeds. The 352nd judgment language clearly indicated the parties' intentions that the deeds be delivered 10 days after the final judgment – NOT months or years afterward, *or never*, as in the case of the release. While A&W made much at trial of Shirley's interpretation of the wording of the Agreed Judgment in reference to the delivery of the

deeds, her understanding can hardly be characterized as "completely false" (App. G-28). Once again, the appeals court simply impermissibly speculated regarding Shirley's motivation without a factual finding by the trial court. More important, however, A&W was not a participant in the 352nd suit, and had no standing to rely upon it.

D. The Opinion follows the trial court in blaming the victims. On the one hand, it states "In their response, WNT, James, and Ramona attempted to place the blame for their alleged breach on their attorneys" (App. G-29). On the other, the Opinion admits "Salterelli testified at trial that the release of the agreed judgment should have been filed in the deed records office, but that he had mistakenly requested an abstract of judgment instead, which he never received" (App. G-28). Thus, the Opinion ultimately establishes the executors' probable cause – as does the professionals' settlements of Estate and WNT malpractice claims.

E. More important, however, the Opinion found that because A&W was not a party to the 48th suit, it was not affected by the 48th judgment. [App. G-70] Following the appeals court's analysis then, it is not possible for A&W to have sustained damages from any action to obtain the 48th judgment or from its effects. If, as the Opinion theorizes, A&W "may not have had standing" to challenge the effect of the judgment (App. G-72 fn. 18), the courts have clearly erred in assuming that A&W had standing to complain that it was somehow damaged by a fraud on the 48th court.

G. The courts below failed entirely to analyze the chronology of events and actions in 1993 and 1994 in that, if there was a material breach of contract, such breach occurred in 1993. And if there was no enforceable contract in early 1994, the courts below abused their discretion in

finding either breach of contract actions thereafter or conspiracy to breach thereafter.

H. "As we note in our discussion of appellants' breach of contract complaints, the trial court's award of damages caused by the breach of the commercial lease agreement ***implies*** a finding that the damages were caused by appellants' conspiracy to fraudulently induce the breach." [emphasis added] (App. G-38) The appeals court cannot imply such findings and clearly abused its discretion in doing so. The appeals court's authority states that a "Court of Appeals can only "unfind" facts, not make original findings of fact, ***and exceeds its authority when it implies a finding of actual damages in tort.***" [emphasis added] *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986). But the appeals court consciously disregarded the authority's final clause in its attempt to justify its abuse of discretion (App. G-66). (See pages 27-28 below).

I. "All of this evidence supports the trial court's conclusion that the written agreements between the appellants were evidence of their conspiracy to commit fraud." [App. G-35] While the Opinion cites the agreements as evidence of conspiracy, it did not find a single unlawful act that damaged A&W – and fails entirely to recognize that those very agreements were entered into six (6) full months after the alleged breach of contract. If A&W was not bound by the 48th judgment, if the agreement between the estate parties is either a family settlement agreement or an agreement to defend a claim (which it clearly says it is), and if it was not directed at A&W, (which it was not), then where is the conspiracy?

Moreover, the courts below failed to address entirely that each of the parties had legal justifications for their actions. The Executors had legal rights to seek damages of breaches of fiduciary duty by their agents.

Shirley had probable cause to seek damages from the WNT's failure to release the 352nd judgment. And Goldblatt had a right to protect himself from A&W's March 1994 lawsuit as owner and holder of the Landmark note. Yet the courts below ignored this probable cause.

J. The Opinion claimed "Fraud damages are available in a case where actual damages are based on an economic breach-of-contract loss if the loss was caused by fraudulent acts." (App. G-38) This holding is clear error, made in direct contradiction of the appeals court's own previous opinions. The Opinion erroneously relied on *Formosa Plastics Corp. v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). (op. on reh'g.) – which is a fraudulent inducement case that requires finding all of the elements of fraud. None of these elements exist on the record of the present action. It also cited *Sharpe v. Kilcoyne*, 962 S.W.2d 697, 703 (Tex.App. – Fort Worth 1998, no pet.) – a default judgment case holding that punitive damages are recoverable in tort actions. But the joinder of a claim in contract with a claim in tort does not alter the general rule: breach of contract cannot support the recovery of exemplary damages (as here). *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex.1981). See *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex.1986).

K. To support an award of exemplary damages, the plaintiff must prove a "distinct" independent tortious injury with actual damages arising from that injury. See *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex.1986); *City Products Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex.1980) ("[W]hen a separate distinct, willful tort is alleged and proved in connection with a suit upon a contract, one may recover punitive damages. But in such instance the complainant must prove some actual

damages.") No tort damages were found by the courts below, and appeals courts erred in implying them, *Tex. Nat'l Bank v. Karnes*, *supra* at 903, especially for acts engaged in six (6) full months after the breach of contract.

III.

DOES A STATE COURT'S FAILURE TO PROPERLY IDENTIFY CONTINGENCIES AND/OR AN UNENFORCEABLE "AGREEMENT TO AGREE" AMOUNT TO AN ABUSE OF DISCRETION VIOLATING A LITIGANT'S CONSTITUTIONAL RIGHTS?

When the record in a case has revealed plain error, this Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly his federal constitutional claim in the court below. See, e.g., *Vachon v. New Hampshire*, 414 U.S. 478 (1974). *Williams v. Florida*, 465 U.S. 1109, 104 S. Ct. 1617, 80 L. Ed. 2d 146, 52 U.S.L.W. 3686 (1984).

This Court has recognized for almost a century that the object of contract construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made. *Sand Filtration Corporation America v. Cowardin,* 213 U.S. 360, 53 L. Ed. 833, 29 S. Ct. 509. In *Ware v. Allen*, 128 U.S. 590, 595, an action upon a written instrument, the defense was that it was understood between the parties at the time the instrument was signed that it should not be of any effect unless in certain named contingencies, which, it was shown, never occurred. Mr. Justice Miller, speaking for this Court, said:

"We are of opinion that this evidence shows that the contract upon which this suit is brought never

> went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter" *Burke v. Dulaney*, 153 U.S. 228, 38 L. Ed. 698, 14 S. Ct. 816.

A&W's attorney for the Lease and Agreement testified at trial that he intended the first sentence of Section 28 to set up two contingencies. The Section's terms could not be triggered before "Lessor is able to deliver clear fee simple, indefeasible title to the Leased Premises." The Opinion acknowledged that "The record indicates, however, that this cloud was not removed" (App. G-10, fn. 4). This appeals court finding establishes unequivocally that the first contingency of Section 28 never occurred and that no contract was ever formed as a matter of law. Yet the trial court found the opposite and the appeals court inexplicably affirmed it in cascading abuses of discretion that violated Goldblatt's rights.

In Texas, the existence of a contingency clause does not prevent the contract from being a true contract for the sale of land. The contract, however, is not enforceable and binding until the condition is met. *Knox v. Townes*, *supra* at 292 (Tex.Civ.App.-Waco 1971, no writ); *Zeluff v. Ekman*, 386 S.W.2d 838, 841-842 (Tex.Civ.App.-Houston 1965, no writ). Until the condition is met or discharged, neither the forfeiture of escrow clause nor the conveyance and payment terms of the contract come into play *Willeford v. Walker*, 499

S.W.2d 190, 192 (Tex.Civ.App.-Corpus Christi 1973, no writ). The courts below unlawfully disregarded these authorities.

The seminal issue of Section 28, however, is controlled by The Texas Supreme Court's own teaching in *Fort Worth Independent School District v. City of Fort Worth*, 22 S.W.3d 831, 845 (Tex.2000), 43 Tex.Sup.Ct.J. 742. ("When an agreement leaves material matters open for future adjustment and agreement that never occur, it is not binding upon the parties and merely constitutes an agreement to agree.") In Texas, lack of definiteness in agreement may concern time of performance, ***price to be paid***, work to be done, service to be rendered, or property to be transferred. [emphasis added] *University Nat. Bank v. Ernst & Whinney*, 773 S.W.2d 707 709 (Tex.App.-San Antonio,1989). The record shows, and the Opinion enunciated, that no price was ever "determined."

The Opinion erred in claiming on one hand that "Section 28 does not leave a material term open for future negotiation. Section 28 contains an appraisal mechanism for determining the price to be paid for the Dawn Lane property, up to $327,000." (App. G-51) and on the other, inconsistently stating that: 1) "The estate and A&W first attempted to agree on a sale price **by offers and re-offers**." (App. G-10); 2) "Instead, they simply wanted to **reach a price** at which the sale could be finalized (App. G-10); 3) "During this time, McCown and Saltarelli sent letters to James that mentioned the ongoing process to appoint appraisers **in order to determine a sale price**" (App. G-11); and 4) Section 28 contained "an appraisal mechanism for **determining the price to be paid**" (when the section was triggered, i.e., **at a future date**) (App. G-51).

Under these facts – as shown in the Opinion's own words – the courts below abused their discretion by failing to apply the relevant legal standards to the facts of the case that show unequivocally that Section 28 was never more than an "agreement to agree" and was treated as such by the parties.

It is well settled that where the contract clause of the Federal Constitution is involved, this Court will determine independently whether a contract exists, its obligation within the protection of the contract clause and whether that obligation has been impaired. Similarly, this Court will determine for itself the meaning and application of state provisions said to create the contract or which impair it. *Coombes v. Getz*, 285 U.S. 434, 52 S. Ct. 435; 76 L. Ed. 866. (The contract rights considered in *Coombes v. Getz* arose from a contract between a third party and the corporation. And the power reserved against the corporation and its members was deemed to be ineffective against a stranger such as Goldblatt.)

IV.

DOES A STATE TRIAL COURT'S FAILURE TO FIND ALL ELEMENTS OF A CIVIL TORT REQUIRED UNDER THAT STATE'S LAWS VIOLATE A LITIGANT'S CONSTITUTIONAL DUE PROCESS RIGHTS?

Conspiracy to breach a contract is an oxymoron. This Court has declared that at common law, it is widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious. *Beck v. Prupis,* No. 98-1480 (U.S. 04/26/2000) Breach of contract is not a tort.

This concept has been well established in Federal jurisprudence for more than a century. A mere common plan, design or even express agreement is not in itself

enough for liability; there must be tortious acts in carrying it into execution; W. Prosser, *Law of Torts* §46, p. 293 (4th ed. 1971) Only where means are employed, or purposes are accomplished, which are themselves tortious, will the conspirators who have not acted but have promoted the act be held liable. *Satin v. Satin*, 69 App. Div. 2d 761, 762, 414 N. Y. S. 2d 570, (1979) (Memorandum Decision) There is no tort of civil conspiracy in and of itself. There must first be pleaded specific wrongful acts that constitute an independent tort. *Cohen v. Bowdoin*, 288 A. 2d 106, 110 (Me. 1972) 'Conspiracy' fails as the basis for the imposition of civil liability absent the actual commission of an independently recognized tort. When such separate tort has been committed, it is that tort, and not the fact of combination, that is the foundation of the civil liability. *Earp v. Detroit*, 16 Mich. App. 271, 275, 167 N. W. 2d 841, 845 (1969). The plaintiff must allege all the elements of a cause of action for the tort the same as would be required if there were no allegation of a conspiracy. *Lesperance v. North American Aviation, Inc.*, 217 Cal. App. 2d 336, 345 31 Cal. Rptr. 873, 878 (1963) Conspiracy cannot be made the subject of a civil action unless something is done that, without the conspiracy, would give a right of action. *Middlesex Concrete Products & Excavating Corp. v. Carteret Indus. Assn.*, 37 N. J. 507, 516, 181 A. 2d 774, 779 (1962). *Chapman v. Pollock*, 148 F. Supp. 769, 772 (WD Mo. 1957) (holding that a plaintiff who charged the defendants with "conspiring to perpetrate an unlawful purpose" could not recover because the defendants committed no unlawful act); *Olmsted, Inc., v. Maryland Casualty Co.*, 218 Iowa 997, 998, 253 N. W. 804 (1934) A conspiracy cannot be the subject of a civil action unless something is done pursuant to it that, without the conspiracy, would give a right of action. *Adler v.*

Fenton, 24 How. 407, 410 (1861) "The act must be tortious, and there must be consequent damage."

A Texas plaintiff must show that the damages were proximately caused by a conspiracy to commit unlawful acts to accomplish a particular object as an element of a civil conspiracy claim. *Potash Corp. of Saskatchewan, Inc. v. Mancias*, 942 S.W.2d 61 (Tex.App.Corpus Christi, 1997). The trial court found no such unlawful act.

On November 27, 1993, the recognized date of the breach of contract (App. G-12):

A. Goldblatt had not been contacted by James; (App. G-13)

B. Long had not filed suit in the 48th court; (App. G-13)

D. Long's 48th court summary judgment had not been filed; (App. G-14) and

E. There was no agreement among any of the parties of the 352nd suit to do anything (App. G-15).

These facts show clearly that no conspiracy could have existed under Texas law to breach the Lease because civil conspiracy in Texas requires specific intent. The parties must be aware of the harm or the wrongful conduct ***at the beginning of the combination or agreement***. [emphasis added] *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608 (Tex.,1996). See also *Triplex Communications v. Riley*, 900 S.W.2d 716, 719 (Tex., 1995).

Goldblatt was uninvolved in (and unaware of) James' actions stopping the sale process on November 27, 1993, until months after James' action. He did not know or meet any other Estate-aligned individual until after A&W filed suit against him on March 27, 1994. Yet the trial court awarded exemplary damages against Goldblatt in another abuse of discretion in direct conflict with Texas law and authority that declares "Tortious conduct committed after breach of contract, no matter how

malicious or inexcusable, will not form basis for recovery of exemplary damages for infraction of the agreement." *Van Sickle v. Clark*, 510 S.W.2d 664 668 (Tex.Civ.App.-Fort Worth 1974, no writ).

The Opinion impermissibly affirmed the Judgment by "implying" a tort while relying on a faulty recitation of *Tex. Nat'l Bank v. Karnes*, *supra* at 903 (Tex. 1986) (App. G-38). Claiming that a "court of appeals can only 'unfind' facts, not make original findings of fact" the appeals court consciously disregarded the remainder of the sentence that states an appeals court "exceeds its authority when it ***implies*** a finding of actual damages in tort." [emphasis added] *Tex. Nat'l Bank supra* at 903.

Consistently abusing its discretion by "implying" throughout the Opinion, the appeals court stated variously:

1. "[T]here is ample evidence to support the trial court's **implied findings** that George and Shirley conspired to commit fraud." (App. G-36)

2. "As we note in our discussion of appellants' breach of contract complaints, the trial court's award for damages caused by breach of the commercial lease agreement **implies a finding** that the damages were caused by appellants' conspiracy to fraudulently induce the breach." (App. G-37)

3. "The trial court's judgment awards A&W $150,000 in damages that were caused by the breach. Findings that the breach and the damages were the direct result of appellants' conspiracy may be **implied** from the above conclusions and this damages award" (App. G-53).

4. "Subsumed within the trial court's conclusions that appellants conspired to commit fraud and, as a result, wrongfully deprived A&W of its right to purchase the Dawn Lane property is an **implied** finding

that appellants, including George, committed fraud" (App. G-87).

Although the Opinion states that "A trial court's judgment may not be supported on appeal on a theory of recovery no element of which has been included in the findings of fact," it did exactly that (App. G-58, fn. 14). It also states erroneously that "omitted findings are only supplied if they are necessary to the judgment. *In re Doe*, 19 S.W.3d 346, 357 (Tex. 2000). The Opinion further erroneously states that "As an appellate court, we must give effect to the trial court's **intended findings** if they are supported by the evidence, the record, and the judgment." *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 630 (Tex.1992) (App. G-36).

Such reliance, as wholly incorrect, was an abuse of discretion. The rule that supplemental findings necessary to support a judgment are presumed ***is not applicable*** when findings and conclusions disclose the basis for judgment, and the court does not find such necessary supplemental facts. [emphasis added] *Burford v. Pounders*, 199 S.W.2d 141, 145 (Tex.,1947).

Findings of Fact and Conclusions of Law were filed by the trial court (App. D). Where "the trial court judgment rests upon the specific grounds set out in the findings of fact and conclusions of law that accompany the judgment, ***[an appeals court is] not permitted to assume omitted findings or conclusions necessary to any other grounds for the judgment."*** [emphasis added] *Leonard v. Askew*, 731 S.W.2d 124, 132 (Tex. App.--Austin 1987, writ ref'd n.r.e). *American Industries Life Insurance Co. v. Ruvalcaba*, No. 14-99-00077-CV (Tex.App.-Hous. [14th Dist.] 2002).

A&W's allegation of conspiracy to void the asset purchase agreement is simply without foundation. No

effort was made by anyone to investigate the circumstances of the asset sale until after A&W filed suit on March 28, 1994. The resulting agreement, based on their discoveries of the sale's improprieties, was executed by the parties based on that probable cause and to defend themselves. Such an agreement to marshal a joint defense cannot, as a matter of Texas law, constitute a conspiracy. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

Civil action for conspiracy lies only if the conspirators' acts are malicious and without legal justification and performed with intent of injury to another . . . . *Great Nat. Life Ins. Co. v. Chapa*, 377 S.W.2d 632 (Tex.,1964). All of the parties to the May 1994 agreements had individually-based legal justifications for their actions: Long's allegations that the 352nd Agreed Judgment was breached were held valid in the 48th judgment and by the Opinion's own acknowledgment (App. G-28). Goldblatt's foreclosure was held valid by the trial court in Summary Judgment (App. A) and in its rendition (App. B-8, ll. 19-21). IV's record property title claim from 1989 until Goldblatt's foreclosure was acknowledged in the Opinion (App. G-10, fn. 4). And the Estate's and WNT's recovery of the professionals' malpractice policy limits validated the May 30th Agreement's allegations and proved its probable cause.

CONCLUSION

There are only four issues before this Court:

1. Based on the existing law and authorities, it must find that the state court's permanent injunction against Goldblatt in favor of a tenant at sufferance with inferior ownership claims amounts to an unlawful taking unlawfully depriving Goldblatt of his property.

2. It must similarly find that the state courts' errors in applying state law to established facts and the appeals court's affirmation of those errors, constitute a violation of Goldblatt's constitutional due process rights.

3. It must find that the courts' failures to properly identify contingencies and the unenforceable character of Section 28 as an "agreement to agree" amount to abuses of discretion violating Goldblatt's constitutional rights.

4. And it must find that the state trial courts' failures to find all elements of the civil torts of fraud and conspiracy required under Texas laws violate Goldblatt's constitutional due process rights.

Goldblatt respectfully requests, therefore, that this Court grant *certiorari*, and after appropriate briefing and hearing, reverse and/or remand this matter as appropriate.

Respectfully submitted,

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(214) 821-1214 (FAX)

Frank P. Hernandez
Tx. Bar No. 09516000

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been served on A&W Industries, Inc.'s Attorney of Record, Mr. Paul F. Wieneskie, Cribbs & McFarland, 1000 West Abram Street, Arlington, Texas 76013 on August 10, 2003, via first class mail.

_____

Frank P. Hernandez

APPENDIX A

CAUSE NO. 90 - 1522 - C - 2

A&W INDUSTRIES, INC. Plaintiff	IN
VS.	PROBATE COURT NO. 2
INDIAN VILLAGES, INC. SHIRLEY LONG, SHIRLEY LONG as Trustee for the Klutz Trust, KENN GOLDBLATT, WILBERT OF NORTH TEXAS, INC., JAMES M. DAY and RAMONA DAY as Independent Executors of the Estate of Tommy Joe Day, KEITH WOODLEY, and JOHN COLLINS, Defendants,	OF TARRANT COUNTY, TEXAS

JUDGMENT

Came on to be considered, DEFENDANT KENN GOLDBLATT'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW filed January 15, 1997 and heard February 26, 1997. After hearing arguments the Court finds that the Motion is good.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foreclosure of the Landmark Life Insurance Company mortgage by Kenn Goldblatt on June 7, 1994, cut off, all claims of A&W Industries, Inc. to any right or obligation to purchase the subject real property, as a matter of law.

The motion is therefore GRANTED.

SIGNED this 27th day of May 1997.

_____

PAT FERCHILL JUDGE

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APPENDIX B

REPORTER'S RECORD

VOLUME 29 OF 29

Trial Court Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED; JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY, Plaintiffs AND WILBERT OF NORTH TEXAS, INC. Intervenor VS. FRANK D. McCOWN, LYNN ROSS, JR., JOHN M. SALTARELLI, SHERRY ROUNTREE, AND STANLEY V. McSWANE, JOHN APPLEWHITE, JOHN P. WHITE, BERT GEORGE AND A & W INDUSTRIES, INC. Defendants	)	IN THE PROBATE COURT NUMBER TWO OF TARRANT COUNTY, TEXAS

On the 28th day of July, 1999, the following trial came on to be heard in the above-entitled and numbered cause before the Honorable Pat Ferchill, Judge presiding, held in Fort Worth, Tarrant County, Texas. Proceedings reported by machine shorthand.

KAY MILLER, CSR
Deputy Official Court Reporter
Probate Court No. 2
Tarrant County, Texas

THE COURT: I'm going to make a few preliminary remarks, and I'm not entirely sure I'm going to render my decision or all of my decision at this time, and the things that I mention, I want for the record-- I'm going to have disclaimered to state that these are not my formal findings of fact and conclusions of law. They will be observations, and they will include but not be limited to some of the

things the Court has found during this trial.

I just still am just appalled at the behavior of the independent executors. I personally have never seen anything like it. For James Day, he was a poor historian. He admitted that he had memory problems, and from hearing his testimony, one could have easily thought that Mr. McCown was supposed to be the executor and not Mr. Day.

So to that extent I may agree with you, Mr. Woodley and Mr. Hernandez. The Court can't find whether or not he was informed by his attorney about his executive duties or not, because I don't believe that's stated in the record.

The tone, the flavor of his testimony was consistently in the nature of Mr. McCown being the executor and not Mr. Day, and we know that's not the case. Ramona Day, I'm not quite sure what she did for the estate. Her testimony before this Court was that she signed a document that she claims was incomplete.

The document alludes to a lease attachment that's incorporated therein. This is a woman who is an adult who has capacity who has worked in a legal office as a legal secretary, and she expects this Court to set aside her signature on a

contract because she didn't have enough time to read it or it wasn't complete. I find that testimony not credible.

And Mr. Day, his testimony, if I remember it correctly, was that the agreement was mailed to him and he signed it and he mailed it back, and apparently neither one of them understood the ramifications of Section 28 until months after they had signed this agreement.

Now, let's just assume for a minute that these executors discovered in the fall of 1993 that they may have made a mistake. What would they do? Well, first of all, they'd sit down with their own attorneys and discuss-- Before they expose the estate to liability, they would sit down with their attorneys and discuss these misgivings or these claims.

If they felt like that the attorneys were part of it, they could have gone to another attorney and said, "I believe that somebody may have misrepresented facts to me. What are my options." I mean, executors just can't on their own fire attorneys and just stop the process.

And I think the best testimony is clear that the legal process was ongoing, and if James and

Ramona Day didn't know about it, that's their fault. They were the executors. It was a clear breach of contract.

And Mr. Day, instead of being personally insulted by the $95,000 offer should have gotten out the contract or got a copy of the contract and read. Now, I'm not going to go into whether or not the $95,000 was an example of horse trading on the part of A & W Industries or their firm belief that that was the value of the real estate.

But clearly the contract James and Ramona Day signed allowed them, gave them the opportunity to make a bid or offer a price less than the stated value of $327,000. And if you think for a minute, this changed from an option to an obligation.

And I think it's only reasonable that if you're obligating yourself to buy something in the future that there might be this so-called escape hatch. I think Mr. Andrews in his testimony spoke about that. He put that in for protection of his clients.

Be that as it may, that's really not the issue here. Instead of James Day being personally insulted and getting his nose out of joint, he should

have got out the contract and read it, and when he read that A & W Industries had the right to make a first offer, then he should have sat down with his then attorneys, his new attorneys, some attorneys, and discussed what is going to happen if we stop this process right now.

What if we walk away from this contract? What are the ramifications to this estate? And before he did that, he should have had advice from his attorneys, and he did not, and Ms. Day did not. And instead I'm not exactly sure when the estate regained counsel, and I'm not sure that that's important.

But I'm focusing on the action of James Day and I find that he, with Ms. Day going along with it, stopped the process. So I find there was a breach of a contract. It's just to me simple contract situation breached. Now there's been a heck of a lot of other water has gone under the bridge.

I want to make something clear about another thing about Mr. Day. I don't consider Mr. Day writing an inquiry, "Put this one in the hopper" to be instructions to Frank McCown to negotiate a deal. I think the only testimony we have in the record that anyone ever authorized Mr. McCown to negotiate a deal

was his own testimony, and the Court's chosen to believe it, that the only time that he was authorized to go out and negotiate a contract was with A & W Industries.

And you know the executors were the ones that should have said we want-- They're the ones that give the instructions, and I see nothing in the record to show that he was ever authorized to negotiate with anyone else.

Now, as far as the conspiracy goes, gentlemen, I think you may have made some dots, but just to be really simplistic, the dots don't connect. I just don't see a conspiracy here. And I don't see a reason for Mr. McCown to be involved in the conspiracy.

He has paid for-- His malpractice carrier has paid for the alleged malpractice problems in this matter, and I just don't see anything that he has done that rises above the level of errors and omissions as a professional, and the Court just fails to find that there was a conspiracy.

Now, based upon that, the Court is going to award A & W Industries their requested damages in the amount of rent which they've testified here was $274,000, plus the Court will award the rent,

I guess, on a prorata basis to the date of judgment. Court will find that the $2,500 is a reasonable monthly rent for market value rent. The Court will award them their attorney's fees as requested.

Now, as to the matter of the constructive trust, the Court has wrestled with this issue throughout the trial, and I'm of the belief that in order for the Court to invoke that remedy, there must be clean hands on the part of the party requesting it.

And I just find that Ms. Rountree's testimony was so lacking, and so lacking in credibility, and that the lease was obviously violated. I think that if they had a lease, they should have been careful to pay the taxes. They should have observed the letter of the lease given the circumstances they were in, and I'm going to deny the constructive trust.

That leaves-- The Court having previously found that Mr. Goldblatt's foreclosure was valid, the Court will not affect that. The Court will find that A & W should be awarded the amount of $150,000, which the Court finds to be a reasonable market value of that property at that time.

The Court's going to find that

notwithstanding Mr. Goldblatt's owning the property at 827 Dawn Lane, the Court's going to find that all of the allegations of the intervenors, the executors, the Wilbert, the Court is going to enter a take-nothing judgment on all of those.

Now, the only thing the Court is going to take under advisement and study and think about is whether or not the Court is going to find that there was a conspiracy as alleged by A & W Industries, and if so, what damages the Court will award. The Court will find that the Plaintiffs, intervenors and executors and et cetera, that they had reasonable attorney's fees, but the Court does not award same.

This is one of the most incredible cases the Court has ever heard, and I just can't go back enough to the point about the executors' actions in this and what they have done to the estate. That's all the rendition I care to give today.

I know y'all are going to have some questions, and I think you all should write them down and we'll meet, and if there's specific matters the Court hasn't ruled on, we'll get together. I'll notify you when I've made a decision about the conspiracy allegations against the executors, et cetera. Court is in recess.

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APPENDIX C

Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED.	§	IN THE PROBATE COURT
JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY	§	
vs.	§	
FRANK D. MCCOWN, BERT GEORGE SHERRY ROUNTREE, JOHN C. APPLE-WHITE, and A&W INDUSTRIES, INC	§	NO. TWO
vs.	§	
INDIAN VILLAGES, INC., SHIRLEY LONG, SHIRLEY LONG as Trustee for the KLUTZ TRUST, KENN GOLDBLATT, GEORGE DAY, and WILBERT OF NORTH TEXAS, INC.,	§	TARRANT COUNTY, TEXAS

JUDGMENT

On May 26, 1999, this cause came on to be heard. James M. Day and Ramona Day, the Independent Co-Executors of the Estate of Tommy Joe Day, appeared in person and through their attorney of record, Keith Woodley. Kenn Goldblatt appeared in person and through his attorney of record, Frank P. Hernandez. Wilbert of North Texas, and Indian Villages, Inc. appeared through their President, Kenn Goldblatt and through their attorney of record Frank P. Hernandez. Shirley Long and Shirley Long as Trustee for the Klutz Trust appeared through her attorney of record, Charles E. McDonald. George Day appeared in person and represented himself pro-se Frank D. McCown appeared in person and through his attorneys of record William D. Cobb, Jr. and Shari Keeley. Bert George, Sherry Rountree, and John C. Applewhite appeared in person and through

their attorneys of record Orsen E. Paxton, III, Jeff S. Knotts, and Daniel J. Parish. A&W Industries, Inc. appeared through its President, John C. Applewhite and its attorneys of record Orsen E. Paxton, III, Jeff S. Knotts, and Daniel J. Parish. All parties announced ready for trial. The jury having been waived by agreement of the parties, all questions of fact were submitted to the Court. All issues relating to the claims against Frank D. McCown as well as Lynn Ross, John Saltarelli and Stanley McSwane, were fully and completely settled. The Court, after examining the evidence and hearing the testimony presented and the arguments of counsel, finds as follows:

1. James M. Day and Ramona Day, as Independent Co-Executors of the Estate of Tommy Joe Day, entered into a contract with A&W Industries, Inc. for the sale of Estate assets and the lease and eventual sale of Estate real property.

2. The lease agreement incorporated into the contract James and Ramona Day entered into gave A&W Industries, Inc. the opportunity to submit an offer to purchase the leased property for less than $327,000.

3. The lease agreement obligated the independent co-executors, as controlling shareholders of Wilbert of North Texas, Inc., to sell, and A&W Industries, Inc., to purchase the leased property.

4. James M. Day and Ramona Day, acting as Independent Co-Executors of the Estate of Tommy Joe Day, breached the contract entered into with A&W Industries, Inc.

5. The following parties wrongfully and intentionally conspired to inflict injury on A&W Industries, Inc.: James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Individually, and as Trustee of the Klutz Trust, Wilbert of North Texas, Inc., and Indian Villages, Inc.

6. No one party was more than 50% responsible for the damage caused to A&W Industries, Inc.

7. A&W Industries, Inc. is entitled to recover from James M. Day and Ramona Day, as Independent Co-Executors of the Estate of Tommy Joe Day, and Kenn Goldblatt, jointly and severally, the sum of $274,000.00, as damages for rent paid by A&W Industries, Inc. through July, 1999, and further is entitled to recover from Kenn Goldblatt, individually, rent paid in the amount of $3,000.00 per month, from and including August, 1999, through the date of this Judgment.

8. A&W Industries, Inc. is entitled to recover from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, its attorneys' fees and expenses in the amount of $550,212.18. A&W Industries, Inc. is further entitled to recover attorneys' fees and expenses, jointly and severally, in the amount of $30,000.00, if this judgment is appealed; $10,000.00, if petition for review is submitted to the Texas Supreme Court; $20,000.00 if briefs are submitted to the Texas Supreme Court; $10,000.00 if argument is made before the

Texas Supreme Court; and $20,000.00, if this judgment is appealed to Federal Court.

9. A&W Industries, Inc. is entitled to recover from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, the sum of $150,000, as the reasonable market value of the leased premises at the time of the breach of the lease agreement provision requiring the sale of the leased property.

Based on the findings of the Court, it is therefore, ORDERED ADJUDGED AND DECREED that A&W Industries, Inc. have and recover actual damages from James M. Day, Ramona Day, and Kenn Goldblatt, jointly and severally, in the sum of $274,000.

IT IS FURTHER ORDERED that A&W Industries, Inc. have and recover actual damages from Kenn Goldblatt, individually, in the sum of $30,000.00 representing rent paid by A&W Industries, Inc. from August, 1999 through May 31, 2000.

IT IS FURTHER ORDERED that A&W Industries, Inc. have and recover actual damages from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert ofNorth Texas, Inc., and Indian Villages, Inc., jointly and severally, in the sum of $ 150,000.00, as damages for the breach of the lease agreement provision requiring the sale of the leased property.

IT IS FURTHER ORDERED that A&W Industries, Inc. have and recover from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert

of North Texas, Inc., and Indian Villages, Inc., jointly and severally, necessary and reasonable attorneys' fees and expenses in the following amounts:

a. $550,212.18 for the trial of this case;

b. an additional $30,000.00, if this Judgment is appealed to the Court of Appeals;

c. an additional $10,000. 00, if a petition for review, or a response thereto, is to be filed with the Supreme Court of Texas;

d. an additional $20,000.00 if the Supreme Court of Texas requests that the parties file briefs on the merits;

e. an additional $10,000.00 if the Supreme Court of Texas sets the case for argument;

f. an additional $20,000 if this Judgment is appealed to Federal Court

All appellate attorneys fees are conditioned upon A&W Industries, Inc. being the successful party during appeal.

IT IS FURTHER ORDERED that the award of attorneys' fees is taxed as part of the costs of court.

IT IS FURTHER ORDERED that the following parties pay the following sums as punitive or exemplary damages resulting from their conduct:

$75,000.00 James M. Day, individually, and as Independent Co-Executor of the Estate of Tommy Joe Day;

$75,000.00 Ramona Day, individually, and as Independent Co-Executor of the Estate of Tommy Joe Day;

$50,000.00	Kenn Goldblatt
$25,000.00	George Day
$25,000.00	Shirley Long Day
$10,000.00	Wilbert of North Texas, Inc.
$5,000.00	Indian Villages, Inc.

IT IS FURTHER ORDERED that James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., their agents, servants, employees, or any person acting in concert with them are permanently enjoined from directly or indirectly interfering in any way with the business and operation of A&W Industries, Inc., or the real or personal property of A&W Industries, Inc., including the leased property located at 827 Dawn Lane, Grapevine, Texas, and from pursuing further claims against A&W Industries, Inc., Bert George, Sherry Rountree, John C. Applewhite, or their attorneys, that are in any way related to the. ownership or operation of A&W Industries, Inc. d/b/a Wilbert of North Texas.

IT IS FURTHER ORDERED that this Judgment shall bear interest at the rate of 10% per annum from the date of this Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims asserted or which could have been asserted in this cause by James M. Day and Ramona Day, Independent Co-Executors of the Estate of Tommy Joe Day and/or by Wilbert of North Texas, Inc. against Defendant Frank D. McCown are hereby dismissed with Prejudice to the refiling of same.

IT IS FURTHER ORDERED that all costs of court expended or incurred in this cause are adjudged against James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, and all writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

All other relief not expressly granted herein is denied.

SIGNED this 11th day of May, 2000.

_____

JUDGE PRESIDING

Approval as to form:

Orsen E. Paxton, III
State Bar No. 15649100
PAXTON-BEAL, LLP
301 S. Center Street, Suite 300
Arlington, TX 76010

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APPENDIX D

Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED.	§	IN THE PROBATE COURT
	§	
JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY	§	
vs.	§	
FRANK D. MCCOWN, BERT GEORGE SHERRY ROUNTREE, JOHN C. APPLE-WHITE, and A&W INDUSTRIES, INC	§	NO. TWO
vs.	§	
INDIAN VILLAGES, INC., SHIRLEY LONG, SHIRLEY LONG as Trustee for the KLUTZ TRUST, KENN GOLDBLATT, GEORGE DAY, and WILBERT OF NORTH TEXAS, INC.,	§	TARRANT COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

The Court reached the following conclusions of law through pre-trial determination. Such conclusions have bearing on the disposition of this case and, thus, are again set forth herein:

1. The Judgement signed in Cause No. 352-122868-89, in the 352nd Judicial District Court of Tarrant County, Texas, has no effect on the ability of Wilbert of North Texas, Inc. to transfer all of its personal property assets to A & W Industries, Inc.

2. Ownership of the personal property of Wilbert of North Texas, Inc. was not affected by the Judgment in Cause No. 352-122868-89.

3. The property pledged to secure the loan from Landmark Life to Wilbert of North Texas, Inc. was adequately described in the Deed of Trust as the real property and fixtures affixed thereto.

4. Kenn Goldblatt's foreclosure on the Deed of Trust lien did not foreclose on any non-fixture personal property on the premises at 827 Dawn Lane, Grapevine, Texas.

5. The doctrine of judicial estoppel was invoked to prevent the Independent Co-Executors of the Estate of Tommy Joe Day and Wilbert of North Texas, Inc. from taking positions inconsistent with the positions held by them in Cause No. 352-122868-89. In that cause the Independent Co-Executors of the Estate of Tommy Joe Day claimed to be the 100% shareholder of the stock of Wilbert of North Texas, Inc., and Wilbert of North Texas, Inc. claimed to be the sole owner of the property located at 827 Dawn Lane.

Additional findings of fact and conclusions of law to the Court's previous determinations.

1. Tommy Joe Day died on June 16, 1990. Finding of Fact

2. James M. Day and Ramona Day are the Independent Co-Executors of the Estate of Tommy Joe Day. Finding of Fact

3. A & W Industries, Inc. (A&W) and Wilbert of North Texas, Inc. (Wilbert) entered into a valid, enforceable Agreement for acquisition of Assets on September 11, 1991. Finding of Fact

4. The executors agreed to a sale price of the assets of Wilbert of $323,000. Finding of Fact

5. The price paid by A&W for the assets of Wilbert was negotiated and agreed to by the parties. Finding of Fact

6. On September 11, 1991 Sherry Rountree was Vice-President of Wilbert. Finding of Fact

7. The Agreement for Acquisition of Assets entered into between A&W and Wilbert attached as Exhibit "A" a

Commercial Lease Agreement containing an obligation to Puchase provision, obligating Wilbert to sell, and A&W to purchase, the real property at 827 Dawn Lane, Grapevine, Texas described as the Leased Premises in te Commercial Lease Agreement. Finding of Fact

8. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to sign the Agreement for Acquisition of Assets on behalf of Wilbert. Finding of Fact

9. A&W and Wilbert entered into a valid, enforceable Amendment to the Agreement for Acquisition of Assets on September 11, 1991. Finding of Fact

10. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or) ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to sign the Amendment to the Agreement for Acquisition of Assets on behalf of Wilbert. Finding of Fact

11. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the Agreement for Acquisition or Assets by claiming continued ownership of the assets. Conclusion of Law

12. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to issue a Bill of Sale for the assets purchased to A&W on behalf of Wilbert. Finding of Fact

13. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached certain warranties' (either express or implied) contained in the Agreement for Acquisition of Assets and the Bill of Sale. Conclusion of Law

14. A&W is entitled to indemnity and reimbursement pursuant to the Bill of Sale from Wilbert of all funds expended by A&W to defend its title to the assets purchased under the terms of the Agreement for Acquisition of Assets and Amendment to Agreement for Acquisition of Assets. Conclusion of Law

15. A&W and Wilbert entered into the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets on the closing date of October 28, 1991. Finding of Fact

16. The Executors were allowed to review the Commercial Lease Agreement prior to execution of the Agreement. Finding of Fact

17. The Commercial Lease Agreement entered into between A&W and Wilbert is a valid, enforceable lease agreement. Finding of Fact

18. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to sign the Commercial Lease Agreement on behalf of Wilbert. Finding of Fact

19. The Obligation to Purchase provision of the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets contained a procedure for determining a sales price for the leased premises. Finding of Fact

20. A&W substantially performed under the terms of the obligation to Purchase provision of the Commercial Lease Agreement. Finding of Fact

21. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day waived (either express or implied) any specific requirements for performance set forth in the obligation to

Purchase provision of the Commercial Lease Agreement. Finding of Fact

22. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the obligation to Purchase provision of the Commercial Lease Agreement entered into between A&W and Wilbert by terminating negotiations and refusing to sell the Leased Premises to A&W at a price to be determined by appraisers. Conclusion of law

23. The breach of the obligation to Purchase provision of the Commercial Lease Agreement between A&W and Wilbert was a result of a conspiracy to commit fraud among the following parties to prevent A&W from being able to purchase the Leased Premises in accordance with the terms of the obligation to Purchase provision of the Commercial Lease Agreement: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

24. The purchase of the Real Estate Lien Note from Landmark Life and subsequent foreclosure by Kenn Goldblatt on the Leased Premises was the result of a conspiracy to commit fraud among the following parties to divest A&W of its right to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

25. Kenn Goldblatt's foreclosure of the real property described as the Leased Premises in the Commercial Lease Agreement wrongfully deprived A&W of its right to purchase the Leased Premises under the

terms of he Obligation to Purchase Provision of the Commercial Lease Agreement. Conclusion of Law

26. The reasonable market value of the Leased Premises during the period of time in the second half of 1993 when A&W was attempting to purchase the Leased Premises was $150,000. Conclusion of Law

27. The following parties were engaged in a conspiracy to defraud A&W evidenced in part by a written Agreement to cooperate to void the Agreement for Acquisition of Assets between A&W and Wilbert, and divest A&W of the assets it rightfully purchased from Wilbert: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

28. All parties found to have conspired to defraud A&W are jointly and severally liable for all damages awarded A&W. Conclusion of Law

29. The conduct of the following parties warrants the assessment of exemplary or punitive damages against them: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

30. A&W is entitled to reasonable and necessary attorneys' fees for legal services rendered on behalf of A&W, its officers and directors to enforce the terms of the Commercial Lease Agreement and to defend against the wrongful claims of the Plaintiffs and Intervenor and to respond to appeal. Conclusion of Law

Signed this 31st day of May, 2000.

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JUDGE PRESIDING

APPENDIX E

Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED.	§	IN THE PROBATE COURT
	§	
	§	
JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY	§	
	§	
vs.	§	
	§	
FRANK D. MCCOWN, BERT GEORGE SHERRY ROUNTREE, JOHN C. APPLE-WHITE, and A&W INDUSTRIES, INC	§	
	§	
	§	NO. TWO
vs.	§	
	§	
INDIAN VILLAGES, INC., SHIRLEY LONG, SHIRLEY LONG as Trustee for the KLUTZ TRUST, KENN GOLDBLATT, GEORGE DAY, and WILBERT OF NORTH TEXAS, INC.,	§	
	§	
	§	
	§	
	§	
	§	TARRANT COUNTY, TEXAS

ORDER OF CONTEMPT

On the 24th day of October, 2000, came on to be heard in relation to the above-entitled and numbered cause, A&W Industries, Inc.'s (A&W) Motion to Enforce Judgment and for Contempt for Violation of Permanent Injunction against Kenn Goldblatt. A&W appeared by personal representative and by its attorney of record and Kenn Goldblatt answered the show cause order of the Court and appeared in person and by attorney of record. After hearing the evidence presented and the arguments of counsel, the Court finds and now holds that this Court has jurisdiction of this proceeding; that the motion for contempt filed herein is in all respects proper and sufficient; and that Kenn Goldblatt was afforded due and proper notice of these proceedings. The Court further finds that its Judgment entered on May 11, 2000, after trial of the above cause is clear and unambiguous and that Kenn

Goldblatt is in contempt of this Court for violating the permanent injunction contained in its Judgment, and finds that Kenn Goldblatt, his attorneys, agents, and anyone else acting in concert with him should be prohibited from engaging in any attempts to evict A&W from the real property located at 827 Dawn Lane, Grapevine, Tarrant County, Texas, and that a Writ of Prohibition should be issued against the Justice of the Peace, Precinct 3, Place 1, Tarrant County, Texas, prohibiting any proceedings related to 827 Dawn Lane, Grapevine, Tarrant County, Texas. The Court finds equity requires rent payments be made by A&W Industries, Inc. and finds the reasonable market value monthly rent of $3,0000.00 per month as previously found by this Court should be increased by five (5%) percent to $3,150.00 and equity further requires that such rent payments should be offset from the amount of the Judgment debt owed by Kenn Goldblatt to A&W Industries, Inc. for each month that A&W Industries, Inc. has occupied or will occupy 827 Dawn Lane, Grapevine, Tarrant County, Texas since June 30, 2000. It is therefore,

ORDERED, that Kenn Goldblatt be held in contempt of this Court and sanctioned $15,000.00 for violating the Judgment of this Court, which amount shall be paid into the registry of this Court on or Nov. 30, 2000 it is

FURTHER ORDERED that Kenn Goldblatt, his attorneys, agents, and anyone else acting in concert with him are prohibited from engaging in any attempts to evict A&W from the property located at 827 Dawn Lane, Grapevine, Tarrant County, Texas, and from any further pursuit of claims or actions in connection with A&W Industries, Inc.'s occupancy of the property; it is

FURTHER ORDERED that a Writ of Prohibition issue against the Justice of the Peace, Precinct 3, Place 1, Tarrant County, Texas, prohibiting any proceedings related to occupancy of 827 Dawn Lane, Grapevine, Tarrant County, Texas; it is

FURTHER ORDERED that A&W Industries, Inc. pay the total amount of $3150.00 per month from July, 2000, as fair market rent for occupancy of 827 Dawn Lane, Tarrant County, Texas and that such amount be credited to Kenn Goldblatt against the judgment debt owed to A&W Industries, Ific. and that each month a notice of offset amount be mailed to Kenn Goldblatt through his attorney of record via certified mail, return receipt requested and that such payment by offset continue for so long as A&W Industries, Inc. occupies 827 Dawn lane, Grapevine, Tarrant County, Texas, but no longer than the termination of ownership of such property by Kenn Goldblatt; it is

FURTHER ORDERED that if Kenn Goldblatt shall fail to perform or comply with this order as set forth, then a capias be issued commanding the sheriff of Tarrant County, Texas, to arrest Kenn, Goldblatt and place him in the county jail in Tarrant County, Texas until such time as he has paid the fine ordered above, or served out the same at the rate of $150.00 a day, at which time the sheriff shall release him from custody; it is

FURTHER ORDERED that the costs of this proceeding shall be and are assessed against Kenn Goldblatt for which execution may issue.

SIGNED October 30, 2000.

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JUDGE PRESIDING

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APPENDIX F

In re Goldblatt, 38 S.W.3d 802, 38 S.W.3d 802 (Tex.App. 02/05/2001)

[1] Texas Court of Appeals (Civil)

[2] No. 2-00-401-CV,, 2-00-402-CV

[3] 38 S.W.3d 802, 38 S.W.3d 802, 2001.TX.0000957 <http://www.versuslaw.com>

[4] February 05, 2001

[5] IN RE KENN GOLDBLATT RELATOR

[6] Panel D: Cayce, C.J.; Day and Livingston, JJ.

[7] The opinion of the court was delivered by: Sam J. Day Justice

[8] ORIGINAL PROCEEDING

[9] OPINION

[10] I. Introduction

[11] Relator Kenn Goldblatt has filed petitions for writs of mandamus, prohibition, and habeas corpus challenging the probate court's permanent injunction contained in the final judgment rendered on May 11, 2000, and the probate court's order holding him in contempt for pursuing a forcible entry and detainer action in the justice court in violation of the permanent injunction. Because the probate court was without jurisdiction to enter an order of contempt, we conditionally grant the petition for writ of mandamus in part and direct the probate court to vacate its October 30, 2000 order to the extent that it holds Goldblatt in contempt of court. Otherwise, we deny the petitions.

[12] II. Factual and Procedural Background

[13] On May 11, 2000, Probate Court No. 2 of Tarrant County rendered a final judgment, which, among other things, permanently enjoined Goldblatt from interfering in any way with the business property of A & W Industries, Inc., "including the leased property located at 827 Dawn Lane, Grapevine, Texas, and from pursuing further claims against A & W . . . that are in any way related to the ownership or operation of A & W Industries, Inc." (hereinafter referred to as the "final judgment"). An appeal of the final judgment is currently pending before this court.

[14] At issue in the underlying suit was whether an agreement for acquisition of assets entered into between A&W; lessee of the Dawn Lane property (hereinafter referred to as the "property"), and Wilbert of North Texas, lessor, obligated Wilbert to sell the property to A&W; the probate court ruled in the final judgment that Wilbert and Goldblatt conspired to commit fraud against A&W; and to prevent A&W's purchase of the property under the acquisition agreement and ordered damages to A & W in the amount of the value of the leased premises. However, before the final judgment was rendered, the court also granted Goldblatt partial summary judgment, ruling that A & W's right to purchase the property was cut off by Goldblatt's foreclosure of the mortgage on the property. After the final judgment was rendered, on June 2, 2000, Goldblatt gave notice to A & W to vacate the property. No supersedeas bond was filed.

[15] On June 5, Goldblatt filed a Designation and Affidavit of Business Homestead on the property in the

deed records of Tarrant County. On June 22, 2000, he filed his notice of appeal of the final judgment. On June 29, he filed a bankruptcy petition and, on August 15, filed a sworn complaint for eviction in the justice court. The appeal of the judgment and the eviction suit were briefly abated during the pendency of an automatic stay resulting from the bankruptcy proceeding. The stay was lifted on September 1 by agreed motion, and we ordered the appeal reinstated on September 19. Goldblatt then informed the justice court of the lifting of the stay and reinstated the eviction suit to proceed on September 25.

[16] On September 20, A & W filed a petition for writ of prohibition in this court to keep the justice court from proceeding in the eviction suit. We denied the petition, stating in our order that there appeared to be an adequate remedy in the probate court. A & W then filed a "Motion to Enforce Judgment and for Contempt for Violation of Permanent Injunction" in the probate court. Goldblatt also immediately rescheduled the eviction suit for October 24, 2000. On October 30, the probate court granted A & W's motion and held Goldblatt in contempt of court, ordering him to pay $15,000 into the registry of the court by November 30 or be placed in jail; issued a writ of prohibition on the justice court, prohibiting it from going forward with the eviction suit; and enjoined Goldblatt from "engaging in any attempts to evict A & W from the property . . . and from any further pursuit of claims or actions in connection with A & W[`s] . . . occupancy of the property." On November 17, 2000, Goldblatt filed

petitions for writs of mandamus, prohibition, and habeas corpus in this court, challenging the contempt order and the permanent injunction in the probate court's final judgment. He also filed a motion for immediate emergency relief, requesting a stay of the effect of the October 30, 2000 order while the petitions were pending in this court. On November 29, 2000, this court issued a stay of that portion of the order holding Goldblatt in contempt and ordering him to pay $15,000 into the registry of the court by November 30 or be placed in jail.

[17] III. Jurisdiction of the Trial Court

[18] Although Goldblatt did not challenge the probate court's jurisdiction to hold him in contempt, we requested A & W to address in its response whether the trial court had jurisdiction to hold Goldblatt in contempt. A & W addressed the issue and filed a motion for contempt in this court. We will not rule on that motion at this time.

[19] Mandamus will issue only if a court has clearly abused its discretion and the aggrieved party has no adequate remedy by appeal. In re Long, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding); Walker v. Packer, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). Contempt orders that do not involve confinement cannot be reviewed by writ of habeas corpus, and the only possible relief is a writ of mandamus. Long, 984 S.W.2d at 625; Rosser v. Squier, 902 S.W.2d 962, 962 (Tex. 1995) (orig. proceeding). Further, a writ of mandamus is available to correct an order that the trial court had no power to enter. Urbish v. 127th Judicial Dist. Court, 708

S.W.2d 429, 431 (Tex. 1986) (orig. proceeding); Gem Vending, Inc. v. Walker, 918 S.W.2d 656, 658 (Tex. App.-Fort Worth 1996, orig. proceeding).

[20] In Schultz v. Fifth Judicial District Court of Appeals, the Texas Supreme Court was faced with the issue of whether an appeals court or the trial court had jurisdiction to enforce the provisions of a turnover order entered by the trial court. 810 S.W.2d 738, 739-41 (Tex. 1991). The supreme court determined that the turnover order in that case acted as mandatory injunction and that it was final and appealable. Id. at 740. The supreme court stated:

[21] For appealable orders in the nature of an injunction, in which the validity of the order alleged to have been violated is itself in issue in the appeal, the appellate court alone is vested with jurisdiction to enforce the injunctive provisions by contempt. . . . A court of appeals may exercise that jurisdiction by referring to the trial court the fact finding burden of hearing testimony and taking evidence, but the appellate court where the appeal is pending must exercise jurisdiction to actually issue the contempt judgment. . . . The fact that a supersedeas bond has or has not been filed does not affect the vesting of exclusive jurisdiction in the appellate court. Id. at 740-41 (citations omitted).

[22] The court held that the court of appeals abused its discretion by refusing to take jurisdiction of a motion for contempt filed in its court to enforce the turnover order

and that it misled the trial court into taking jurisdiction when it had none. Id. at 741.

[23] As in Schultz, the probate court did not have jurisdiction to hold Goldblatt in contempt and order him to pay $15,000 into the registry of the probate court by November 30, 2000, or be confined until he has paid the sanction. *fn1 Thus, because an appeal from the final judgment is pending in this court, only this court has jurisdiction to hold Goldblatt in contempt for violating the probate court's final judgment. Although A & W has filed a motion for contempt in this court, we decline to exercise our contempt power at this time. *fn2

[24] IV. Conclusion

[25] Because the trial court did not have jurisdiction to find Goldblatt in contempt, we conditionally grant Goldblatt's petition for writ of mandamus in part and direct the probate court to vacate the portion of its October 30, 2000 order holding Goldblatt in contempt of court and ordering him to pay $15,000 into the registry of the court by November 30, 2000, or be subject to confinement until the sanction is paid. We lift our stay entered on November 29, 2000, and deny the remaining portions of Goldblatt's petition for writ of mandamus and deny his petitions for writs of prohibition and habeas corpus on all grounds and affirm the remaining portions of the probate court's order. We are confident that the probate court will abide by our ruling and our writ will issue only if the probate court fails to do so.

[26] PUBLISH

Opinion Footnotes

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[27] *fn1 Schultz did not, however, address or limit a trial court's jurisdiction to enforce by other means its final judgment that is the subject of an appeal.

[28] *fn2 It would be advisable for Goldblatt and his attorneys to terminate all attempts to evict A & W from the property until this court has had an opportunity to address the merits of Goldblatt's appeal challenging the final judgment. Moreover, this court will not tolerate further misrepresentations by counsel for Goldblatt. At oral argument, counsel for Goldblatt informed this court that he had advised his client not to seek eviction until after the enforceability of the permanent injunction had been determined, but he also indicated in the petition for writ of mandamus and prohibition that "[e]ach of [Goldblatt's] listed actions have been taken on advice of counsel." We remind counsel of his ethical obligations under the Texas Disciplinary Rules of Professional Conduct and his obligations as an appellate practitioner under the Standards for Appellate Conduct adopted by this court. See Tex. Disciplinary R. Prof'l Conduct 3.01, 3.03, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998) (Tex. State Bar R. art. X, § 9).

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APPENDIX G

COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-00-243-CV

INDIAN VILLAGES, INC., KENN
S
GOLDBLATT, WILBERT OF NORTH TEXAS, INC., RAMONA DAY, JAMES M. DAY, GEORGE A. DAY, SHIRLEY LONG, AND SHIRLEY LONG AS TRUSTEE FOR THE KLUTZ TRUST

APPELLANT

V.

A&W INDUSTRIES, INC., JOHN C. APPLEWHITE, BERT GEORGE, AND SHERRY ROUNTREE

APPELLEES

FROM PROBATE COURT NO. 2 OF TARRANT COUNTY

OPINION

I. Introduction

Indian Villages, Inc., Kenn Goldblatt, Wilbert of North Texas, Inc., Ramona Day, James M. Day, George A. Day, and Shirley Long,[1] individually and as

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[1]Shirley Long is also known as Shirley Long Day.

trustee for the Klutz Trust (collectively, appellants), appeal from the trial court's judgment for A&W Industries, Inc., John C. Applewhite, Bert George, and Sherry Rountree. We affirm.

II. Background Facts and Procedural History

This appeal has a long and complicated factual and procedural history. The subject of the parties' dispute is the ownership of Wilbert of North Texas, Inc. (WNT), a company that manufactures and sells concrete burial vaults, and the real property on which WNT's plant is located. Originally, WNT was owned by Tommy Joe Day and his brother, George Day. In 1984, Tommy bought George's 50% interest in WNT for $250,000. George's interest included his stock and his interest in WNT's land and building, which are known as the Dawn Lane property. By this purchase, Tommy became the 100% owner of WNT and the Dawn Lane property. After the 1984 sale, someone -possibly George-prepared a deed to the Dawn Lane property, which was signed by George's former and future wife, Shirley Long Day, as a purported officer of WNT. The deed stated that WNT conveyed its property to Indian Villages, a corporation that George controlled and Shirley claimed to own. At that time, it was not uncommon for Shirley to sign documents at George's request or suggestion. The deed was not filed in the Tarrant County deed records until July 1989, even though it was dated May 4, 1985.

In August 1989, Tommy hired attorney Frank McCown to file suit against Shirley and Indian Villages, alleging that the deed to Indian Villages was void because Shirley had no authority to execute it and that the registered agent for WNT had been improperly changed. The suit was filed in the 352nd District Court of Tarrant County on September 8, 1989. George Day and the Klutz Trust were later added as defendants.

Tommy was murdered on June 16, 1990 by Merry Day Freeze, his former step-daughter. A few days earlier, Tommy had consulted with his lawyer about changing his will to remove Ramona Day, his ex-wife and Merry's mother, as a co-executor, but he was killed before he could sign the new will. Two days after Tommy's death, on June 18, 1990, George and Shirley filed two more deeds involving Tommy's property. The deeds purported to have been signed by Tommy in May 1986 and stated that he conveyed both real property and his stock in WNT to the Klutz Trust. The record indicates that George may have eventually been convicted for forging at least one of these deeds.

Tommy's will named another brother, James Day, and Ramona as independent co-executors. James retained McCown to continue the 352nd court suit and to represent him as a co-executor in estate matters. Due to suspicions between James and Ramona, Ramona hired Lyn Ross, the attorney who had prepared Tommy's will, and his lawfirm to represent her in Tommy's

estate matters, The two executors and attorneys divided the duties between them. Ramona and Ross were responsible for preparing and filing the estate's inventory and federal and state estate tax returns, and James and McCown were to handle the sale of WNT and the 352nd court lawsuit.

Very soon, it became apparent that WNT and its property would have to be sold to pay estate taxes. The lawyers advised that these taxes could be paid out over time,[2] but both James and Ramona wanted to pay the estate taxes and wind up the estate as soon as possible. Part of their desire for quick action stemmed from their concerns about personal liability as executors for the estate taxes. James also did not want to sign the estate tax return and inventory due to his concerns about personal liability for statements in the documents. Because both WNT's stock and the Dawn Lane property were tied up in the 352nd court lawsuit, James and Ramona decided to sell only WNT's assets and to lease the Dawn Lane property to the purchaser of the assets until the title issues could be resolved.

Bill Stein was hired as an independent expert to value WNT. Stein was a certified public accountant associated with the Wilbert, Inc. home office.

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[2]Donald R. Williams, a former revenue agent and attorney for the Internal Revenue Service, also testified at trial about the options available to an estate to obtain an extension of time to pay estate taxes.

(WNT is a franchise of Wilbert, Inc.) Stein had evaluated fifteen to twenty Wilbert franchises across the country. Stein valued WNT, including the Dawn Lane property, at $635,000.

Initially, James and Ramona gave Sherry Rountree the option to purchase WNT. As Tommy's former principal employee, Rountree knew the business, and James and Ramona had asked her to continue her employment and run the business after Tommy's death. Rountree eventually declined to purchase WNT, however.

James and Ramona received various inquiries about the possible sale of WNT, which they forwarded to McCown. McCown did not consider any of these inquiries viable except for an offer by John Applewhite and Jack White, who later formed A&W Industries, Inc. A&W knew about the 352nd court litigation and the deeds that had been fled cluding the estate's title to WNT, but was willing to more forward with the sale in time to allow the estate taxes to be paid from the sale proceeds. Consequently, on August 1, 1991, James and Ramona instructed McCown to negotiate the best deal possible with A&W

Meanwhile, White met with McCown on May 15, 1991 and submitted a letter of intent that did not list a price. A&W later submitted an asset acquisition agreement with a purchase price of $278,000 listed for WNT's

assets, but McCown eventually negotiated a purchase price of $323,000 for the assets.

Attached to the asset acquisition agreement was a commercial lease agreement, which initially contained an option to purchase the Dawn Lane property at a price not to exceed $327,000. Thus, the parties' documents provided that A&W could purchase both WNT's assets and the Dawn Lane property for a total of $650,000. Because the estate attorneys believed it would be more advantageous to the estate to sell the Dawn Lane property to A&W once the title issues were resolved rather than simply lease it to them, the option was changed to an obligation to purchase for $327,000. The estate attorneys discussed this provision with both James and Ramona. Because of this change, A&W's attorney changed the $327,000 sale price from a firm price to a ceiling price, with an election that allowed A&W to trigger an appraisal process if it believed the value of the property had decreased by the time the title was cleared. This change was faxed to McCown just before a meeting of the executors and their lawyers and was discussed at the meeting.

The final version of the asset acquisition agreement with the attached commercial lease agreement was dated September 11, 1991. The commercial lease agreement provided that A&W would pay WNT rent of $1500 per month, pay all property taxes as they became due, and keep the building and

improvements insured. (At the same time., WNT was obligated to pay Landmark Life Insurance Company approximately $5200 per month on its mortgage on the Dawn Lane property.) The closing documents also included a bill of sale, which required all assets purchased by A&W to pass free and clear of all liens, and an amendment to the asset acquisition agreement. The amendment amended section 1.01 (d) of the asset acquisition agreement, which had originally provided that A&W would receive as an asset of WNT

> [a]ll cash received by the Business on or after September 1, 1991, less the ordinary and usual expenses of the Business for the period from September 1, 1991 through the Closing Date[.]
>
> The amendment provided instead that A&W would receive as an asset all cash that WNT received arising from shipments made on or after September 1, 19.91 and that A&W would reimburse WNT at closing for the ordinary and usual business expenses that WNT incurred from September 1, 1991 through the closing date.

There is conflicting evidence in the record concerning when James initially saw, read, and signed the agreement, amendment, and bill of sale and concerning how many versions of the agreement he reviewed. During this time, James was taking various medications for chronic pain and depression. The medications affected his memory, his ability to recall events from 1990 to 1996, and his ability to perform his duties as executor. He was hospitalized for

two weeks in December 1990 for clinical depression and continued to see a psychiatrist and a psychologist for several years thereafter. McCown, Ross, and John Saltarelli, another attorney with Ross's law firm, testified, however, that all the various provisions were discussed and fully explained to both James and Ramona during lengthy executors' meetings. Ramona also testified that the appraisal provision was discussed in executors' meetings at which she and James were present. James admitted that the amendment to the asset acquisition agreement seemed better for WNT than what was in the original asset acquisition agreement.

The sale of WNT's assets was scheduled to close on October 28, 199 1. The sale nearly fell apart, however, because Applewhite and White came up $100,000 short in their financing. Finally, within ten days of the closing date, Bert George, Rountree's long-time companion, agreed to put up the remaining money. James did not know about this arrangement.

Neither James nor Ramona attended the actual closing, but they had previously signed a "Consent of Directors and Shareholders," which was attached to the asset acquisition agreement. Ramona signed the consent as a director of WNT, and she and James both signed as executors of Tommy's estate. Rountree, in her capacity as WNT's vice president, signed the closing documents pursuant to this signed consent on WNT's behalf. James knew

beforehand that Rountree would be signing the asset acquisition agreement on WNT's behalf. James could not sign the agreement because he was not an officer of WNT.

A&W paid WNT $323,000 for its assets (excluding the Dawn Lane property). The bank held 10% of this sales price, $32,300, in escrow for six months after the sale. WNT received the remaining $290,700 at closing. WNT and Tommy's estate used this money to pay estate taxes, federal income taxes, and other expenses, the total of which exceeded $300,000.

Pursuant to the amendment to the asset acquisition agreement, A&W was also supposed to have reimbursed WNT at closing for the ordinary and usual business expenses that WNT had incurred from September 1 through October 28, 1991. Instead, Rountree used this money, with James's permission, to pay the balance due on two Mack trucks that WNT was transferring to A&W under the asset acquisition agreement, as well as to bring WNT's mortgage current. (Rountree made these payments because the bill of sale required WNT to transfer all of its assets to A&W free and clear of all liens and other encumbrances.)

In approximately mid-1992, George Day went to federal prison for conspiring to make illegal bank loans.[3]

The 352nd court lawsuit was resolved by an agreed judgment on December 15, 1992. The judgment cleared the way for the sale of the Dawn Lane property by providing that Shirley, Indian Villages, and the Klutz Trust would release and cancel all their claims to the Dawn Lane property, including the cloud created by the deed filed in July 1989,[4] and that the estate owned all of WNT's stock. The judgment also provided that the estate owned the property purportedly conveyed by Tommy to the Klutz Trust in the deeds filed two days after Tommy's death. The agreed judgment also required WNT and the estate to deliver to Shirley deeds to several unrelated properties, but not "until 10 days after this judgment is final by the time for appeal expiring." Finally, the agreed judgment permanently enjoined George, Shirley, Indian

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[3]At the time of trial, George had also been convicted of wire fraud and issuing cashier's checks without authority, and he had been indicted for uttering a forged document, tampering with bail bond and public records, and improperly influencing a grand jury. George's law license was also suspended because of the federal criminal convictions.

[4]The record indicates, however, that this cloud was not removed. A title commitment obtained by McCown in February 1993 still showed Indian Villages as the record owner of the Dawn Lane property. This is the only title commitment McCown obtained.

Villages, and the Klutz Trust from making any further attempts to convey WNT's or the estate's property and from interfering with WNT's business.

After the deeds required in the agreed judgment were signed and delivered to Shirley, the estate told A&W that it was ready to sell the Dawn Lane property. The estate and A&W first attempted to agree on a sale price by offers and re-offers; and then resorted to a modified version of the appraisal procedure outlined in the commercial lease agreement. Neither the estate's attorneys nor Applewhite required strict compliance with the procedural requirements of the appraisal process, such as obtaining a title commitment to begin the process, the use of MAI appraisers,[5] and strict compliance with time periods. Instead, they simply wanted to reach a price at which the sale could be finalized. During this time, McCown and Saltarelli sent letters to James that mentioned the ongoing process to appoint appraisers in order to determine a sale price. James and Ramona discussed the ongoing appraisal process, but neither contacted the estate's attorneys to complain about the modified procedure being used.

In September 1993, in the midst of the offer and appraisal process, McCown realized that he had developed a conflict of interest with James due

[5]"MAI" stands for "Member of the Appraisal Institute," a professional appraisal organization.

to McCown's representation of A&W and its principals in an unrelated lawsuit. Consequently, he and James terminated their attorney-client relationship. James informed Saltarelli by letter that McCown had a conflict of interest in handling the Dawn Lane property sale, but Saltarelli apparently believed McCown continued to represent James in all other matters. Also, McCown never informed Saltarelli about the conflict of interest, and McCown periodically asked Saltarelli for updates on the status of the sale.

On November 27, 1993, James faxed A&W a hand-written letter halting all negotiations for sale of the Dawn Lane property and requesting information about numerous items. James also stated in the letter that he considered A&W's then current offer for the Dawn Lane property-$102,000-to be an insult. Also on November 27, James faxed a hand-written letter to Saltarelli, stating that Saltarelli did not represent him and that James was "amazed and angry" that Saltarelli had selected an appraiser and was moving forward with the appraisal process. In late December 1993, Ramona fired Ross and Saltarelli from representing the estate. Her decision was based partly on James's concerns and partly on her belief that Ross and Saltarelli were not keeping her properly informed. Ramona also went along with James's decision to cease negotiations for the sale of the Dawn Lane property because she believed the appraisals they were receiving were too low.

In late 1993, George Day got out of prison. While he was still in prison, however, he had telephoned Kenn Goldblatt to thank him for doing some research that George believed was instrumental in eventually "springing" him from the federal penitentiary.

In January 1994, Shirley and Indian Villages sued James, Ramona, and WNT in the 48" District Court of Tarrant County, seeking a declaratory judgment that they had breached the agreed judgment entered in the 352nd court lawsuit and an order setting aside the 352nd court agreed judgment. James hired Keith Woodley to represent him, Ramona, and WNT. In 1992, Woodley had represented Shirley in a suit she had filed against WNT in Brown County, Texas.

Also in early 1994, James contacted Goldblatt for assistance in obtaining from A&W and the fired estate attorneys documents and information about the estate. James had met Goldblatt while Goldblatt was a university student and had supervised Goldblatt's master's thesis in English while teaching at the University of Texas at El Paso. On February 11, 1994, James gave Goldblatt a power of attorney to act for the estate.

Meanwhile, the mortgage on the Dawn Lane property. was in default, and Landmark Life Insurance Company, the mortgagor, posted the property for foreclosure in March 1994. James discussed this problem with Goldblatt, who

ultimately avoided the foreclosure sale by purchasing the note on the Dawn Lane property from Landmark Life in late February. Goldblatt paid Landmark Life $35,500 of the $39,000 principal balance owed. Goldblatt restructured the note, dropping WNT's monthly payments from $5,200 to about $750. James was receiving $1,500 per month in rent from A&W, but he refused to cash the checks and made only one $750 note payment to Goldblatt.

In late March 1994, A&W sued WNT, the estate, and Goldblatt in the 141st District Court. A&W alleged breach of contract and sought injunctive relief to prevent Goldblatt from foreclosing on the Dawn Lane property and thereby depriving A&W of its right to purchase the property. This suit was later nonsuited or dismissed. Also in March 1994, Shirley moved for summary judgment on her claims in the 48th court lawsuit.

On April 21, 1994, Goldblatt sent James notice that WNT and the estate were once again delinquent in their note payments. Goldblatt threatened to accelerate the entire $35,500 balance of the note. James did not ask Goldblatt for additional time to bring the note current, nor did he do anything else to address the delinquency. Goldblatt also sent James a notice of sale dated April 26 and a demand for full payment dated April 27, threatening full foreclosure on June 7, 1994. James did nothing to prevent the foreclosure.

At the same time, Goldblatt, James, Ramona, Shirley, Indian Villages, and Woodley were negotiating a new agreement, dated May 30, 1994. This agreement contemplated Goldblatt's foreclosure of the Dawn Lane property and recited that McCown, Ross, their law firms, and Rountree had failed in their respective duties to the estate. The May 1994 agreement also provided that James and Ramona, as the estate's executors, would transfer all of the estate's stock in WNT to Goldblatt and assign all claims the estate or WNT may have against anyone to Goldblatt. James testified that this meant they assigned to Goldblatt any claim for his own wrongful foreclosure of the Dawn Lane property. Also in the May 1994 agreement, Shirley agreed to transfer to Goldblatt all of her stock in WNT, her alleged ownership interest in WNT's other assets, and to assign to him all claims that might be applicable to her ownership of WNT. In the event of foreclosure, Goldblatt agreed to hold the Dawn Lane property in trust for the estate until the estate's beneficiaries received certain amounts of money from WNT's profits. If the estate took possession of the property, James and Ramona agreed to return the property to Goldblatt once the estate's beneficiaries received the aforementioned money from WNT's profits. Goldblatt paid nothing in exchange for these benefits.

Also on May 30, 1994, Goldblatt and George Day entered into an agreement that alleged in pertinent part as follows:

- In the mid-1980s, George had entered into a number of agreements with family members and business associates, including Tommy, to transfer George's property for inadequate or no consideration.
- George made these agreements to preserve his assets and defraud his creditors.
- Among these assets were WNT and the Dawn Lane property, which George had purchased in 1972.
- George and Goldblatt first met in February 1994, when Goldblatt decided to purchase the Landmark Life note Tommy had made on the Dawn Lane property.
- In March 1994, Goldblatt and Tommy's estate had been sued by A&W.
- Goldblatt was aware of the sale of WNT's assets to AW of George's business practices, and of the existing judgments against George. Armed with this knowledge, Goldblatt obtained title to an F.D.I.C. judgment entered against George in Brown County, Texas in February 1990.
- George would assist Goldblatt, as successor to the F.D.I.C. judgment, to recover the assets that George owned or controlled in 1984.
- Among other things, George agreed to: (1) disclose fully to Goldblatt any and all of George's actions concerning his assets and to reveal their true ownership and value; (2) assist in the location of all documents and evidence required to facilitate the recovery of such assets and to support Goldblatt's claims to the assets; (3) fully and cooperatively testify wherever his assistance might be needed to recover anything of value relating to the agreement; and (4) use his business experience and professional knowledge to assist Goldblatt in discovering the most efficient and cost-effective

ways to recover anything of value covered under the agreement.

- In return, Goldblatt would compensate George for his cooperation.

On June 2, Shirley obtained a summary judgment in the 48th court suit. The 48 th court judgment cancelled and set aside the agreed judgment in the 352 nd court suit, decreed that Shirley had owned title to all of the WNT stock since 1983, and decreed that Indian Villages owned the Dawn Lane Property and that the Klutz Trust owned the properties purportedly conveyed to it by Tommy in the deeds filed two days after his death.

On June 7, 1994, Goldblatt foreclosed on the Dawn Lane property. Goldblatt testified that he foreclosed because A&W had filed suit against him, WNT, James, and Ramona, not because of the default on the note. In the underlying case, the trial court granted Goldblatt's motion for a partial summary judgment that his foreclosure of the Landmark Life mortgage cut off all of A&W's claims to any right or obligation to purchase the Dawn Lane property.

A&W's lawsuit ultimately ended up in Probate Court No. 2 of Tarrant County. By the time of trial, A&W was aligned with Applewhite, Bert George, and Rountree (collectively, appellees) against Goldblatt, WNT, Indian Villages, James, Ramona, George, and Shirley (collectively, appellants). After a two month trial, the probate court found in favor of appellees. The trial court

rendered judgment on May 11, 2000 and entered findings of fact and conclusions of law on May 31, 2000. This appeal followed.

III. James and Ramona's Individual Liability

The trial court rendered judgment holding James and Ramona jointly and severally liable with the other appellants for actual damages and attorney's fees and individually liable for punitive damages. James and Ramona contend the trial court erred by rendering judgment against them individually because an estate creditor cannot recover a personal judgment against an estate's legal representatives. See Bailey v. Cherokee CountyApp. Dist., 862 S.W.2d 581, 583 (Tex. 1993) (op. on reh'g) (stating general principle that estate creditor must enforce its claim against estate, where estate assets have not been distributed, rather than against estate's heirs, devisees, legatees, or legal representatives). This legal principle has no application here, however, because A&W's claims are not simply those of a creditor against Tommy's estate. Rather, A&W sued James and Ramona for conspiracy and other wrongful acts that they committed.

An estate executor has been likened to both a trustee and an agent acting on behalf of a principal. Id. at 584 (stating that estate administrator is "an active trustee of the trust estate"); Ward v. Property Tax Valuation, Inc., 847 S.W.2d 298, 300 (Tex. App.-Dallas 1992, writ denied) (analogizing executor's

role to that of agent acting on behalf of principal). Agents and trustees are liable for the torts they commit, and an agent is also liable for breach of contract if the agent has an interest in the subject matter of the contract. See TEX. PROP. CODE ANN. § 114.083(d) (Vernon 1995) (providing that trustee is personally liable for torts committed by trustee or. trustee's agents and employees); Pabich v. Kellar, 71 S.W.3d 500, 507 (Tex. App.-Fort Worth 2002, pet. granted) (op. on reh'g) (noting that courts will hold corporate agent liable where it appears that individual is using corporate entity as a sham to perpetrate a fraud, avoid personal liability, or avoid the effect of a statute); Keyser v. Miller, 47 S.W.3d 728, 732 (Tex. App.-Houston [11" Distj 2001, pet. granted) ("it has long been the law in Texas that a corporate agent knowingly participating in a tortious or fraudulent act may be held individually liable, even though he performed the acts as an agent for the corporation."); City of Houston v. First City, 827 S.W.2d 462, 480 (Tex. App.-Houston [1st Dist.] 1992, writ denied) (noting well-settled exception to Texas law that agent who contracts on behalf of principal is personally liable to other contracting parties where agent has an interest in the subject matter of the contract); see also Cross v. Old Republic Sur. Co., 983 S.W.2d 771, 774 (Tex. App. -San Antonio 1998, pet. denied) (noting with approval probate court's judgment against estate administrator, individually and as estate administrator, for

misappropriating estate funds and willfully failing to perform his administrative duties). Thus, even though James and Ramona were executors of Tommy's estate, they could be held personally liable for fraud, knowing participation in other torts, and breach of a contract in which they had a personal interest. We overrule James and Ramona's arguments to the contrary.

IV. Conspiracy

A. A&W's Pleadings Give Fair Notice of Their Conspiracy Claims

James and Ramona also contend that A&W failed to plead and prove that they engaged in a civil conspiracy. A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 583 (Tex. 2001). The elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983). James and Ramona assert that neither their breach of their contracts with A&W, their agreement with the rest of appellants to "resist a claim," Goldblatt's purchase of the note on the Dawn Lane property, nor his foreclosure of the Dawn Lane property were unlawful acts.

Texas follows a "fair notice" pleading standard, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant at trial. See Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 896 (Tex. 2000). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." Id. at 897 (quoting Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)); see also TEX. R. CIV. P. 47 (providing that a pleading setting forth a claim for relief must contain a short statement of the cause of action sufficient to give fair notice of the claim involved, a statement that the damages sought are within the jurisdictional limits of the court, and a demand for judgment).

A&W alleged in its petition:

- James, Ramona, Goldblatt, and George conspired to void the commercial lease agreement and asset acquisition agreement and to cause A&W's claims or rights under those contracts to become moot. They did this to prevent A&W from purchasing the Dawn Lane property and to evict A&W from continued use of the property.
- In May 1994, just before the foreclosure on the Dawn Lane property, the estate's executors entered into a written agreement with Goldblatt and Shirley, the stated purpose of which was to "recover Wilbert of North Texas, Inc. intact as an operating company" owned by Goldblatt. The May 1994 agreement directly violates the permanent injunction contained in the agreed judgment from the 352nd court lawsuit.
- Pursuant to this conspiracy, the estate's executors allowed, without legitimate

opposition, a summary judgment to be rendered in the 48 th court lawsuit in favor of Shirley, Indian Villages, and the Klutz Trust.

- False representations were made in the 48 th court lawsuit in furtherance of the conspiracy to defraud -A&W of its right to purchase the Dawn Lane property and of its title to the assets it had rightfully purchased from WNT. The 48th District Court relied on the false statements and rendered judgment setting aside the 352nd court agreed judgment.
- A&W was not made a party to the 48th court lawsuit, despite its interest in the Dawn Lane property and WNT's assets.
- George, Shirley, Goldblatt, James, and Ramona conspired to defraud A&W of ownership of the assets rightfully purchased from WNT, to prevent A&W from exercising its contractual right to purchase the Dawn Lane property pursuant to the commercial lease agreement, and to tortiously interfere in the business of A&W by, among other things, conspiring to cut off A&W's property rights to the Dawn Lane property through foreclosure, filing knowingly false inventories, and making sworn false statements.
- Goldblatt's wrongful actions in foreclosing on the Dawn Lane property and purchasing it for himself were the continuation of James and Ramona's wrongful actions and the past and current actions of George and those working on his behalf in their ongoing attempt to divest A&W of ownership of the assets purchased from WNT and its rights to the Dawn Lane property.

These allegations are sufficient to give James and Ramona fair notice of A&W's claims that they, along with the other appellants, had conspired to commit fraud upon the 48th District Court in order to set aside the 352nd court

agreed judgment and thereby unlawfully prevent A&W from exercising its contractual right under the commercial lease agreement to purchase the Dawn Lane property and to unlawfully re-acquire the WNT assets that A&W, had previously purchased from WNT and paid for. We overrule James and Ramona's deficient pleading arguments.

B. Conspiracy to Commit Fraud Upon the 48th District Court

Appellants all contend, however, that because A&W did not plead and prove that they conspired to commit a tortious or unlawful act, they cannot be held liable for conspiracy.

Conspiracy is a derivative tort, not an independent claim. Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (op. on reh'g); Bradt v. Sebek, 14 S.W.3d 756, 766 (Tex. App.-Houston [1st Dist.] 2000, pet. denied), cert. denied sub nom., Bradt v. Lilly, 532 U.S. 905 (2001). The gist of a cause of action for conspiracy is damage from the commission of a wrong that injures another and not the conspiracy itself. Laxson v. Giddens, 48 S.W.3d 408, 410 (Tex.App.-Waco 2001, pet. denied); Schoellkopf v. Pledger, 778 S.W.2d 897, 900 (Tex. App.-Dallas 1989, writ denied). Thus, a defendant's liability for conspiracy depends on the commission of some underlying tort or other actionable wrong for which the plaintiff seeks to hold at least one of the named defendants liable. Tilton, 925 S.W.2d at 681 (conspiracy to commit fraud and

intentional infliction of emotional distress); Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 926 (Tex. 1979) (conspiracy to evade city's wrecker permit ordinance); Berry v. Golden Light Coffee Co., 160 Tex. 128, 327 S.W.2d 436, 438 (1959) (conspiracy to circumvent statutory requirement that a motor carrier must have a permit to transport its goods); Laxson, 48 S.W.3d at 411 (conspiracy to violate DTPA); Schoellkopf, 778 S.W.2d at 900 (conspiracy to tortiously interfere with a contract). Civil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or the wrongful conduct at the beginning of the combination or agreement. Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996).

We hold that A&W's allegations are sufficient to plead a fraud upon the court, which is an actionable unlawful act for which appellants could be held liable. A fraud upon the court occurs when the parties to a lawsuit enter into a sham judgment by agreement, without a fully adversarial trial or without any trial or evidence concerning the merits, because the parties intend to use the judgment against a third party. See State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 705 & n.5, 714 (Tex. 1996) (where plaintiff and defendant insured agreed that sham judgment would be taken against defendant, that defendant would assign his failure-to-defend and denial-of-coverage claims against his insurer to plaintiff, and that plaintiff would not execute on

judgment against defendant, but would instead pursue assigned claims against insurance company). Filing a false, sworn statement for the purposes of influencing a court's decision also constitutes a fraud upon the court. See Sutphin v. Tom Arnold Drilling Contractor, Inc., 17 S.W.3d 765, 768 (Tex. App.-Austin 2000, no pet.); see also Cross, 983 S.W.2d at 774 (where estate administrator perpetrated a fraud on probate court by representing to court that no claims existed against estate, when administrator knew of substantial claims against it). Fraud upon the court is an unlawful act, and a third party who has been injured by the fraud is entitled to judicial relief to remedy the situation. See Gandy, 925 S.W.2d at 705, 714 (allowing insurance company to sue to set aside agreed sham judgment between plaintiff and defendant-insured that was rendered as a result of fraud perpetrated upon the court); Sutphin, 17 S.W.3d at 773 (holding that trial court had inherent power, after its plenary jurisdiction had expired, to investigate whether party had perpetrated a fraud upon the court by filing false affidavits in a special appearance proceeding); Skepnek v. Mynatt, 8 S.W.3d 377, 380-81 (Tex. App.-El Paso 1999, pet. denied) (upholding trial court's imposition of sanctions against parties and their attorney for committing fraud on the court by filing a groundless special appearance motion supported by a false affidavit).

C. Sufficiency of the Evidence to Support Conspiracy Conclusions of Law

The evidence is also legally and factually sufficient to support the trial court's conclusions that appellants conspired to commit fraud upon the 48th District Court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement and to void the asset acquisition agreement; that Goldblatt's purchase and foreclosure of the Landmark Life mortgage was a result of appellants' conspiracy to commit fraud; and that the foreclosure wrongfully deprived A&W of its right to purchase the Dawn Lane property.

1. Standard of Review

Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's answer. Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996); Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994). However, unchallenged findings of fact are binding unless the contrary is established as a matter of law or there is no evidence to support the findings. McGafflard v, Kuhlmann, 722 S.W.2d 694, 696 (Tex. 1986); Reliance Ins. Co. v. Denton Cent. Appraisal Dist., 999

S.W.2d 626, 629 (Tex. App.-Fort Worth 1999, no pet.). Conclusions of law may not be challenged for factual sufficiency, but they may be reviewed to determine their correctness based upon the facts. Forbis v. Trinity Universal Ins. Co., 833 S.W.2d 316, 319 (Tex. App.-Fort Worth 1992, writ dism'd).

2. Evidence

The record shows: In January 1994, Shirley, Indian Villages, and the Klutz Trust filed the 48th court lawsuit, seeking a declaratory judgment that WNT, the estate, James, and Ramona had breached the 352nd court agreed judgment. As a result of this alleged breach, Shirley, Indian Villages, and the Klutz Trust requested an order setting aside and cancelling the 352nd Court agreed judgment. In March 1994, Shirley, Indian Villages, and the Klutz Trust moved for summary judgment. In support of the motion, Shirley stated by affidavit that the estate, James, and Ramona had breached the 352nd court judgment by failing to deliver the deeds described in the agreed judgment within 10 days after the judgment was final, as required by the agreed judgment; as a result of the failure to timely deliver the deeds, the properties were foreclosed on by the lienholders, and Shirley, Indian Villages, and the Klutz Trust suffered $99,000 in damages; the estate, James, and Ramona failed to file a satisfaction and release of the $239,339 money judgment in the agreed judgment and instead requested an abstract of judgment.

The record supports Shirley's allegation about the abstract of judgment. Saltarelli testified at trial that the agreed judgment should have been filed in the deed records office, but that he had mistakenly requested an abstract of judgment instead which he never received.

Regarding Shirley's other allegations, however, the 352nd court agreed judgment did not set a deadline for delivering the deeds, but merely provided that the deeds were not to be delivered until ten days after the judgment was final. Shirley later admitted in court that her affidavit misstated what the agreed judgment said, although she interpreted its language differently. In addition, and more importantly, the executed deeds were delivered to Shirley's lawyer in March 1993, more than ten days after the agreed judgment was final, but ten months before Shirley sued to have the 352nd court agreed judgment set aside and nearly a year before she moved for summary judgment on her declaratory judgment claim. Shirley also admitted that she may not have lost the properties referenced in the deeds until after May 31, 1994-more than two months after she moved for summary judgment on her declaratory judgment claim. If this was the case, her allegations of damages in the 48th court lawsuit were completely false.

Also, Ramona testified that all of the parties to the 48th court lawsuit agreed to allow Shirley, Indian Villages, and the Klutz Trust to take a summary

judgment against the estate. Ramona testified that she and James agreed to admit that the estate had breached the 352nd court agreed judgment, and WNT, James, and Ramona admitted in their May 23, 1994 response to Shirley's motion for summary judgment that the estate had breached the agreed judgment. In their response, WNT, James, and Ramona attempted to place the blame for their alleged breach on their attorneys.

In addition, James, Ramona, Shirley, Goldblatt, and Tim Morrow, the president and CEO of Indian Villages, entered into the May 30, 1994 agreement in which they agreed to work together "to recover [WNT] intact as an operating company owned by Kenn Goldblatt, Trustee." The agreement recited that Shirley owned stock in WNT and owned other WNT assets-despite the fact that the 352nd court agreed judgment provided that the estate owned all of WNT's stock and permanently enjoined Shirley from claiming any interest in it, and that all of WNT's assets had been sold to A&W in October 1991. The May 1994 agreement also provided that James and Ramona would transfer all of the estate's stock in WNT to Goldblatt and assign all claims the estate or WNT may have against anyone to Goldblatt. Further, Tim Morrow agreed to convey to Goldblatt Indian Villages' deed to the Dawn Lane property. Thus, Goldblatt attempted to acquire 100% of WNT and the deed to the Dawn Lane property via the May 1994 agreement, and he contended at trial that he owned 100%

of WNT. This evidence shows that all of the parties to the 48th court lawsuit and the May 1994 agreement-Shirley, Indian Villages, the Klutz Trust, WNT, James, Ramona, and Goldblatt -agreed to make it impossible for WNT to sell the Dawn Lane property to A&W and fraudulently orchestrated the granting of the 48th court judgment to accomplish that objective. This evidence further supports the trial court's conclusion that these appellants conspired to fraudulently void the asset acquisition agreement.[6]

On June 2, 1994, a hearing was held on Shirley's motion for summary judgment in the 48th court lawsuit, and the 48th District Court entered summary judgment for Shirley, Indian Villages, and the Klutz Trust that same day. The 48th court summary judgment cancelled and set aside the 352nd court agreed judgment due to an alleged material breach of the agreement in the judgment, decreed that Shirley owned all of the stock in WNT and had owned it since 1983, and decreed that Indian Villages owned the Dawn Lane property. Thus, the 48th court summary judgment took the Dawn Lane property out of the estate, so that the estate could not sell the property to A&W, and made Indian

[6]Illogically, Indian Villages asserts that A&W had no right to purchase the Dawn Lane property from WNT because Indian Villages was the record owner of the property pursuant to the 48th court judgment. But Indian Villages conspired with the other appellants before the 48th court judgment was rendered and while the 352nd court judgment, which gave the estate title to the Dawn Lane property, was in effect.

Villages owner of the property. Goldblatt then foreclosed on the property and took it from Indian Villages on June 7. Technically, however, the foreclosure was unnecessary, since Indian Villages had, through Tim Morrow, agreed to convey to Goldblatt the deed to the Dawn Lane property. This evidence supports the trial court's conclusion that James, Ramona, WNT, Goldblatt, and Indian Villages conspired to commit a fraud upon the court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement; that Goldblatt's foreclosure of the Landmark Life mortgage was a result of the conspiracy; and that the foreclosure was wrongful.

Goldblatt, Indian Villages, and Shirley contend that the May 1994 agreement was a legal contract because it was a family settlement agreement, which is a lawfully recognized means of resolving disputes between estate beneficiaries. To support their position, Goldblatt and Indian Villages rely on the family settlement doctrine, which provides that the beneficiaries of a will may agree among themselves on the distribution of the property bequeathed to them, and the agreement may be effected by an agreement not to probate the will. Salmon v. Salmon, 395 S.W.2d 29, 32 (Tex. 1965); Estate of Morris, 577 S.W.2d 748, 755-56 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.). Goldblatt and Indian Villages assert that their participation in the May 1994

agreement, which merely allowed appellants to marshal a joint defense against A&W's claims in the 141st court suit for breach of contract and an injunction, could not constitute a conspiracy. Shirley simply contends that the agreement was not unlawful and that settlement agreements are favored under Texas law. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997) ("It is the policy of this state to encourage the peaceable resolution of disputes ...." Id.).

The family settlement doctrine does not apply here because none of the parties to the May 1994 agreement were beneficiaries of Tommy's will. Tommy's beneficiaries were his biological daughters and former step-daughters. These appellants' arguments also fail, under the circumstances of this case, because they and the other appellants conspired to use and did use the May 1994 agreement as a means to perpetrate a fraud upon the 48th District Court in order to avoid WNT's contract with A&W.

Finally, George and Goldblatt entered into a separate written agreement on May 30, 1994, the same date on which the other appellants entered into their agreement with Goldblatt. George handwrote at least part of the agreement, and Goldblatt typed it up. In their agreement, Goldblatt and George agreed that George would use his professional knowledge to assist Goldblatt in his effort to recover George's scattered assets, including WNT's assets that had been sold to A&W and the Dawn Lane property. In return George would be

compensated by Goldblatt. George testified that part of the purpose of the agreement was to try to regain ownership of WNT and the Dawn Lane property. At the time of this agreement, the 352nd court agreed judgment was still in effect, and that judgment enjoined George from making any further attempts to convey WNT's property or interfere with WNT's business. Further, A&W had bought and paid for WNT's assets two and one-half years earlier. Thus, George and Goldblatt agreed that George would commit unlawful acts that were both prohibited by the 352nd court agreed judgment and directly contrary to the asset acquisition agreement under which A&W had already performed. This evidence supports the trial court's conclusions that George also conspired to commit a fraud upon the 48th court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement and to void the asset acquisition agreement.

The common purpose from which conspiracy liability arises may be established by reasonable inferences. Carroll, 592 S.W.2d at 926; McWhorter v. Sheller, 993 S.W.2d 781, 788 (Tex. App.-Houston [14th Dist.] 1999, pet. denied). Because all of the appellants signed agreements with Goldblatt on the same day that would enable Goldblatt to recover WNT's assets and the Dawn Lane property, despite the existence of the 352nd court judgment, the trial court could reasonably have inferred that all of the appellants conspired to commit a

fraud upon the 48th court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement.

Further, the record shows that both James and Shirley were in contact with George during this time. James testified that he both visited George while he was in prison and talked with him after he got out of prison in December 1993. Shirley testified that she and George were divorced in 1972 and remarried in April 1995, but that even during the time they were divorced they remained "very friendly" and that she served as the trustee for several trusts that George had created, including the Klutz Trust. Shirley further testified that she relied on George and that he advised her regarding the corporations of which she was an officer, such as Indian Villages. James denied knowing in May 1994 that George had signed an agreement with Goldblatt, but the agreement to conspire may be a tacit understanding rather than a formal agreement, and it is not essential that each conspirator have knowledge of the details of the conspiracy. Kirby v. Cruce, 688 S.W.2d 161, 164 (Tex. App.-Dallas 1985, writ ref'd n.r.e.); Bourland v. State, 528 S.W.2d 350, 354 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.).

It is not required that each and every act of a conspirator be shown to have been in concert with the others or that it be established by direct evidence that all combined at a given time prior to each transaction. Inferences of concerted action may be drawn from joint participation in the transactions and from

enjoyment of the fruits of the transactions on the part of the co-conspirators. Int. Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 582 (Tex. 1963); see also Lesikar v. Rappeport, 33 S.W.3d 282, 302 (Tex. App.-Texarkana 2000, pet. denied) (same); St. Gelais v. Jackson, 769 S.W.2d 249, 257 (Tex. App.-Houston [141 Dist.] 1988, no pet.) (holding that the evidence of the interrelationships between the various defendants was sufficient to support the jury's finding that the defendants acted in concert to defraud the plaintiffs through several transactions, even though not all defendants participated in every transaction). All of this evidence supports the trial court's conclusion that the written agreements between the appellants were evidence of their conspiracy to commit fraud.

Moreover, in this case, Goldblatt, at the very least, had full knowledge of all the details of the conspiracy. Once a conspiracy is proven, each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination. Carroll, 592 S.W.2d at 926; McWhorter, 993 S.W.2d at 787. Accordingly, appellants are all responsible for each other's acts committed in furtherance of the conspiracy.

3. Fact Findings Regarding Conspiracy

George and Shirley attack the trial court's conspiracy conclusions on the ground that there are no fact findings that they conspired to commit fraud. The case on which George and Shirley rely is not on point. The trial court in that case concluded that a corporation had committed fraud and that its sole owner was jointly and severally liable for the resulting damages, apparently based on an alter ego theory. Light v. Wilson, 663 S.W.2d 813, 814-15 (Tex. 1983). But alter ego was not pleaded, and the trial court did not conclude that the owner had personally committed fraud. Id.

In this case, however, the trial court concluded that all of the appellants, including George and Shirley, conspired to commit fraud to prevent A&W from purchasing the Dawn Lane property and to void the asset acquisition agreement. As an appellate court, we must give effect to the trial court's intended findings if they are supported by the evidence, the record, and the judgment. Black v. Dallas County Child Welfare Unit, 835 S.W.2d 626, 630 (Tex. 1992). This rule is based upon well-settled Texas law that in a nonjury trial every reasonable inference and intendment supported by the record will be drawn in favor of the trial court's judgment. Id. As we have discussed, there is ample evidence to support the trial court's implied findings that George and Shirley conspired to commit fraud. Further, fact findings on the ultimate and

determinative fact questions of a case are not to be disregarded simply because they are mislabeled as conclusions of law. McAshan v. Cavitt, 149 Tex. 147, 229 S.W.2d 10 16, 1020 (1950); Posner v. Dallas County Child Welfare Unit, 784 S.W.2d 585, 587 (Tex. App.-Eastland 1990, writ denied). We overrule all of appellants' issues concerning conspiracy.

V. Punitive Damages

Goldblatt and Indian Villages challenge the trial court's award of punitive damages, asserting that there is no evidence that they "engaged in any illegal, intentional act directed at A&W. " The evidence of fraud and resulting damages to A&W that we have discussed in section IV is clear and convincing evidence sufficient to support the punitive damages award. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (Vernon 1997) (providing that exemplary damages may be awarded if claimant proves harm resulting from fraud by clear and convincing evidence). We overrule Goldblatt's and Indian Villages' arguments regarding punitive damages. We also reject Shirley's argument that the exemplary damages award as to her was improper because the only actual damages the trial court awarded A&W based on her conduct were breach of contract damages. See Meek v. Bishop Peterson & Sharp, P.C., 919 S.W.2d 805, 808 (Tex. App.-Houston [14 th Dist.] 1996, writ denied) (noting that punitive damages are not

recoverable for breach of contract). As we note in our discussion of appellants' breach of contract complaints, the trial court's award for damages caused by breach of the commercial lease agreement implies a finding that the damages were caused by appellants' conspiracy to fraudulently induce the breach. Thus, the actual damages assessed against Shirley were in essence damages for fraud. Fraud damages are available in a case where actual damages are based on an economic breach-of-contract loss, if the loss was caused by fraudulent acts. Formosa Plastics Corp. v. Presidio Eng`rs and Contractors, Inc., 960 S.W.2d 41, 47 (Tex. 1998) (op. on reh'g); Sharpe v. Kilcoyne, 962 S.W.2d 697, 703 (Tex. App.-Fort Worth 1998, no pet.). In turn, punitive damages are available where, as here, the claimant has proved harm resulting from the fraud by clear and convincing evidence. TEX. CIV. PRAC. & REM. CODE ANN. 41.003(a).

VI. Breach of Contract

Attached to the asset acquisition agreement between WNT and A&W as exhibit A was a commercial lease agreement, which contained a provision obligating WNT to sell, and A&W to purchase, the Dawn Lane property. The commercial lease agreement is incorporated into the asset acquisition agreement. The trial court's judgment awards A&W Industries actual damages of $150,000 against James, Ramona, Goldblatt, George, Shirley, Indian

Villages, and WNT, jointly and severally, for breach of the obligation to purchase provision in the commercial lease agreement. But in its conclusions of law, the trial court concluded only that WNT and/or James and Ramona, as the estate's independent co-executors, breached the obligation to purchase provision. The trial court did not conclude that Goldblatt, George, Shirley, or Indian Villages breached the obligation to purchase provision. The trial court did conclude, however, that all of the appellants conspired to commit the fraud' that resulted in the breach. The trial court also concluded that all of the appellants were jointly and severally liable for all damages awarded to A&W because of their conspiracy to commit the fraud.

A. WNT's Liability for Breach of Contract

1. Validity of Agreements Between WNT and A&W

WNT contends that the trial court erred in concluding that the asset acquisition agreement, the amendment to the asset acquisition agreement, and commercial lease agreement between WNT and A&W were valid and enforceable. Goldblatt also challenges these conclusions, but he merely adopts WNT's arguments. Consequently, we will only refer to WNT in our discussion. WNT contends that the agreements and the amendment were presumptively fraudulent and therefore void ab initio because McCown and Rountree breached

their fiduciary duties to WNT, James, and Ramona by negotiating and signing the documents.

To support its position, WNT relies on Chien v. Chen, 759 S-W.2d 484 (Tex. App.-Austin 1988, no writ). Chien and the cases on which it is based are not on point, however. They merely stand for the proposition that transactions between a fiduciary and his principal that involve a breach of the fiduciary's duties are presumptively fraudulent and void because of the opportunities presented for fiduciary self-dealing at the principal's expense. Id. at 498 & n.7. In this case, the agreements between WNT and A&W are not between principal and agent. Further, as WNT points out, breach of fiduciary duty is a tort, not a defense to a breach of contract claim asserted by a nonfiduciary third party. Grierson v. Parker Energy Ptrs., 737 S.W.2d 375, 378 (Tex. App.-Houston [14 th Dist.] 1987, no writ); Douglas v. Aztec Petro. Corp., 695 S.W.2d 312, 318 (Tex. App.-Tyler 1985, no writ). Part of WNT's complaint is based on its contention that McCown and Rountree improperly represented or worked for both WNT and A&W at the same time.[7] But absent evidence that any allegedly fraudulent conduct on McCown and Rountree's part.

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[7]For a period of time after the October 28, 1991 closing, Rountree worked for both WNT and A&W and received compensation from both companies.

can be attributed to A&W, WNT cannot avoid its contractual obligations to A&W simply because McCown and Rountree were mutual agents for both WNT and A&W. See Rich v. McMullan, 506 S.W. 2d 745, 749 (Tex. Civ. App. -San Antonio 1974, writ ref'd n.r.e.) (holding that, in the absence of evidence that fraud, if any, of real estate agent relating to modification of contract for sale of property could be attributed to purchasers, sellers could not avoid their obligation under the contract on the ground of the alleged fraud of the parties' mutual agent).

In this case, the only evidence of A&W's alleged collusion with McCown and Rountree came from John White, a disgruntled former employee of A&W. White testified that he, Applewhite, McCown, and Rountree conspired to purchase WNT and the Dawn Lane property at a price under fair market value. White testified that the purpose of the conspiracy was "to get the business as cheap as we possibly could" and that he knew what they were doing was probably illegal, but he did it anyway. White testified that he got out of the conspiracy after two or three months, when he sensed that Applewhite and Rountree had made up their minds that he was not going to continue to be part of the company. White never told Applewhite or Rountree that he wanted out of the conspiracy, however. White's employment with A&W was eventually

terminated. He testified that he did not like Applewhite or Rountree very much because they had swindled him.

Conversely, McCown testified that, although James and Ramona forwarded to him various inquiries they had received regarding the possible sale of WNT, he did not consider any of the inquiries viable except the one from A&W. This was because A&W knew of the 352nd court litigation and the deeds that had been filed clouding the estate's title to WNT, but was still willing to move forward with the sale in time to allow the estate taxes to be paid from the sale proceeds. McCown also testified that the only time he was ever authorized by James and Ramona to negotiate a contract was with A&W and that they instructed him to negotiate the best deal possible. Also, A&W first submitted an asset acquisition agreement with a purchase price of $278,000 listed for WNT's assets, an offer with which James and Ramona were satisfied and wanted to accept. But McCown did not believe it was in the estate's best interest to accept the offer, and he eventually negotiated a purchase price of $323,000 for the assets.

The purchase price for WNT's assets was well above the value of $300,000 that had been placed on the assets by Bill Stein, the independent expert who was hired to value WNT. In addition, the asset purchase price, when combined with the $327,000 projected purchase price for the Dawn Lane

property, equaled $650,000-$15,000 above the $635,000 total valuation that Stein had placed on WNT. Stein testified that McCown did not attempt to coach him or influence his opinion in any way, and there is no other evidence in the record that Stein was improperly influenced by either McCown or Rountree.

Further, White testified that he had discussed his trial testimony with Goldblatt a week or ten days before testifying and that he had sold Goldblatt any ownership interest in A&W that he (White) might have. The trial court stated that it could give little weight to White's testimony because he "came across as too disgruntled and too hostile." The trier of fact has several alternatives available when presented with conflicting evidence: It may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard, 722 S.W.2d at 697. Accordingly, as fact finder, the trial court was free to disbelieve White's testimony and believe McCown's and Stein's testimony.[8]

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[8]WNT and Goldblatt both complain that McCown negotiated Rountree's employment contract with A&W. The portion of the record to which Goldblatt directs us, however, does not support his assertion that this was done without the executors' knowledge or consent. To the contrary, McCown testified that "'James was very persistent and insistent that we protect Sherry in this and that she get an employment contract." McCown testified that he represented Rountree in her employment contract negotiations but that John Andrews, A&W's lawyer, actually drew up the contract.

WNT also complains that Rountree converted the funds due to WNT at closing under the amendment to the asset acquisition agreement and used the money to pay the balance due on two Mack trucks that WNT was transferring to A&W. Rountree testified, however, that she did this with James's permission. Tommy's estate was the sole shareholder in WNT and, as co-executor of the estate, James was the estate's representative. WNT cannot avoid its contractual obligations to A&W based on Rountree's actions that its sole shareholder's representative had approved.[9]

WNT also asserts that Rountree improperly failed to disclose to James and Ramona the fact that the purchase price for WNT's assets and/or the Dawn Lane property was a "much reduced purchase price." WNT infers that one of the reasons for both the reduced purchase price and the failure to disclose was the fact that Rountree's long-time boyfriend, Bert George, owned part of A&W and loaned A&W money. WNT does not direct us to any evidence that Bert George's contribution of capital or his loan to A&W so it could purchase WNT's.

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[9]WNT also contends that, if a contract between it and A&W was formed, WNT's performance was excused by A&W's failure to pay at closing the amounts due WNT under the amendment to the asset acquisition agreement. This argument is defeated by James's approval of Rountree's actions, as discussed above. See, e.g., Rich, 506 S.W.2d at 747 ("It is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance.").

assets defrauded WNT of anything. Indeed, as we have previously noted, the evidence shows that, at closing, the purchase price for the assets and the Dawn Lane property was above, not below, the valuation placed on the business by an independent expert.

The rest of the evidence on which WNT relies involving McCown and/or Rountree relates to complaints WNT, James, and Ramona may have had against McCown or Rountree for breach of fiduciary duty, but it is not evidence of any collusive or fraudulent conduct in which McCown, Rountree, and A&W participated together. In addition, the trial court granted WNT, James, and Ramona's motion to dismiss with prejudice all of their claims against McCown, and we will not reconsider those claims here. We overrule WNT's arguments in which it contends that the agreements between it and A&W are void ab initio.

2. Delivery of a Complete Set of Documents

WNT contends that no enforceable contract was ever formed between it and A&W because no one delivered a full and complete copy of the agreements to James and Ramona. WNT contends that a contract is not binding unless the following elements are established: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) communication that each party has consented to the terms of the agreement;

and (5) execution and delivery of the contract with intent that it become mutual and binding on both parties. See Buxani v. Nussbaum, 940 S.W.2d 350, 352 (Tex. App. -San Antonio 1997, no writ); McCulley Fine Arts Gallery, Inc. v. X Partners, 860 S.W.2d 473, 477 (Tex. App.-El Paso 1993, no writ). WNT asserts that, because no complete set of the agreements was ever delivered to James and Ramona, there was no existing contract subject to breach.[10]

As we discuss in section VI(B), Ramona actually signed the agreements at closing as a director of WNT. WNT does not contend that the agreements were not complete at closing; therefore, we fail to grasp how WNT can seriously contend that a complete set of the agreements was never delivered to Ramona. James testified that the obligation to purchase provision and the amendment to the asset acquisition agreement were not in the version of the agreements delivered to him. He testified that he provided the only set of documents he had received to his attorney, but admitted that the documents he was describing had never been offered into evidence at trial. On the other hand, McCown, Ross, and Saltarelli all testified that all the various provisions in the agreements were discussed and fully explained to both James and Ramona during lengthy executors' meetings. This evidence is sufficient to

[10]Indian Villages makes this same complaint without citing any legal authority for it.

show that a complete set of the agreements was delivered to James and Ramona and to support the trial court's findings. We overrule this argument.

3. Ratification of the Commercial Lease Agreement

WNT challenges the legal and factual sufficiency of the evidence to support the trial court's finding that James and Ramona authorized or ratified Rountree's signing of the commercial lease agreement. The record contains ample evidence that James and Ramona consented to, ratified, and approved of WNT's officers signing the asset acquisition agreement, to which the commercial lease agreement was attached and incorporated. Both Rountree and Ramona signed the asset acquisition agreement as WNT's officers, and James and Ramona knew Rountree would be signing on WNT's behalf. This evidence is detailed in our discussion of James and Ramona's breach of contract issues in section VI(B), and we need not repeat it here.[11]

WNT also complains that James and Ramona did not ratify Rountree's signing of the agreement because they lacked full knowledge of all the facts surrounding the transaction, such as Bert George's loan of money to A&W. As WNT points out, however, ratification occurs when a principal, who had no knowledge originally of its agent's unauthorized act, retains the benefits of a

[11]See slip op. at 52-55.

transaction after acquiring full knowledge. Land Title Co. of Dallas, Inc. v. F. M. Stigler, Inc., 609 S.W.2d 754, 756 (Tex. 1980); Ebner v. First State Bank, 27 S.W.3d 287, 303 (Tex. App.-Austin 2000, pet. denied). Assuming for argument's sake that WNT's factual contentions about James and Ramona's pre-signing lack of knowledge are correct, WNT and the estate benefitted from Rountree's signing of the agreement when they received the $323,000 purchase price for the assets from A&W. It is undisputed that WNT and James and Ramona, as the estate's representatives, retained these benefits and have never offered to return them, even after learning of Rountree's allegedly unauthorized actions. Accordingly, WNT's complaint is overruled.

4. Enforceability of Option to Purchase Provision

WNT asserts that section 28 of the commercial lease agreement is unenforceable because: (1) section 28 is an option to purchase the Dawn Lane property, which was not supported by independent consideration; (2) A&W materially breached the lease by failing to timely pay the ad valorem taxes and rent required by the lease; (3) section 28 is not a contract because it leaves open a necessary and material term-price-for future determination; (4) WNT neither notified A&W in writing that the title to the Dawn Lane property had been cleared nor delivered to A&W a title commitment, so A&W's obligation to purchase the Dawn Lane property was never triggered; and (5) A&W did not

timely follow the appraisal provision that was to be used if the parties could not agree on a purchase price.[12] All of these arguments fail.

First, WNT's assertion that section 28 is an option to purchase is incorrect. Although section 28 originally contained an option to purchase the Dawn Lane property, the option was changed to an obligation to purchase before the agreement was signed, and the estate attorneys discussed this change with both James and Ramona.

Second, the record does not support WNT's assertion that A&W failed to pay the $1500 per month rent required by the commercial lease agreement. Goldblatt testified that A&W stopped making rental payments from July through December 1993. To support his testimony, Goldblatt produced a hand-written piece of paper with one column of figures on the left-hand side and another on the right. WNT relies on the hand-written document to show that A&W stopped making lease payments. But Goldblatt testified that Rountree had created the document and had told him the figures on the left were the payments that had been made against the lease. The left-hand column shows $1600 payments were made from October 1, 1991 through December 1,

[12]Indian Villages raises many of these same challenges under its first issue, but cites no legal authority to support them. These arguments fail for the same reasons that WNT's arguments fail.

1993. The figures in the right-hand column, which contains several gaps, were disbursements.

Regarding the ad valorem taxes, there is evidence that A&W paid some, but not all, of the 1992 and 1993 ad valorem taxes late. As a matter of law, however, this breach was not material.[13] In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance. Hemandez v. Gulf Group Lloyds, 875 S.W.2d 691, 692-93 (Tex. 1994). The less the nonbreaching party is deprived of the expected benefit, the less material the breach. Davis v. Allstate Ins. Co., 945 S.W.2d 844, 846 (Tex. App.-Houston [11t Dist.] 1997, no writ). There is no evidence that WNT was deprived of any benefit because of A&W's late payment of some of the ad valorem taxes. In addition, Rountree paid the overdue taxes as soon as she learned of them and all of the taxes and late penalties were paid by March 1994. Also, the reason some of the taxes were paid late was that the taxing notices were sent to Indian Villages instead of WNT. As soon as she discovered this problem, Rountree called the taxing authorities and asked them to correct the mailing address to WNT's address.

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[13]Goldblatt also challenges the validity of the lease on this ground, but he does not brief his complaint.

WNT asserts that even the trial court referred to A&W's performance under the lease as "a clear breach of contract." This contention misstates the record. The trial court made this statement in describing James and Ramona's conduct, not A&W's.

Third, section 28 does not leave a material term open for future determination. Section 28 contains an appraisal mechanism for determining the price to be paid for the Dawn Lane property, up to $327,000. Texas law does not require that a specific dollar amount be agreed upon in order for a contract to be enforceable. Penwell v. Barrett, 724 S.W.2d 902, 905 (Tex. App.-San Antonio 1987, no writ). Rather, a contract is sufficiently definite when it provides a standard to be applied in determining price or specifies that a third person will fix the price. Id.; see also Miga v. Jensen, 25 S.W.3d 370, 376 (Tex. App.-Fort Worth 2000, pet. granted) (stating same regarding other contractual elements).

Fourth, section 28 obligated WNT, not A&W, to notify A&W that the title to the Dawn Lane property had been cleared and to deliver a title commitment to A&W. "it is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance." Rich, 506

S.W.2d at 747. Thus, WNT cannot use its failure to perform these obligations as a basis for contending that the contract is unenforceable.

Fifth, although the obligation to purchase provision in section 28 contains certain time deadlines and other procedures for the appraisal process, neither the estate's attorneys nor A&W required strict compliance with the procedural requirements. Instead, they simply wanted to reach a price at which the sale could be finalized. During this time, McCown and Saltarelli sent letters to James that mentioned the ongoing process to appoint appraisers in order to determine a sale price. James and Ramona discussed the ongoing appraisal process, but neither contacted the estate's attorneys to complain about a modified procedure being used. This evidence supports the trial court's finding that WNT, James, and Ramona. waived any specific requirements for performance set forth in section 28. We overrule WNT.'s, Goldblatt's, and Indian Villages' arguments regarding the validity and enforceability of the agreements between WNT and A&W.

B. James and Ramona's Liability for Breach of Contract

James and Ramona challenge the trial court's conclusion that they personally breached the asset acquisition agreement and the obligation to purchase provision in the commercial lease agreement. They contend that they

cannot be personally liable for breach of the agreements because they were not parties to the agreements.

The record shows that James and Ramona did not sign the asset acquisition agreement, which incorporated the commercial lease agreement. Instead, they signed a consent of WNT's shareholders and directors that consented to, ratified, and approved of the asset acquisition agreement and authorized WNT's officers to sign the agreement. Ramona signed the shareholders and directors' consent in two capacities: as a director of WNT and as an executor of Tommy's estate. James signed only as an executor of the estate. A&W contends that James and Ramona signed as shareholders of WNT, but the consent lists the estate as the only WNT shareholder. James and Ramona merely signed on the estate-shareholder's behalf, as executors.

As executors of the estate, James and Ramona could only be personally liable for a breach of the asset acquisition agreement if: they had expressly or impliedly assumed liability for the agreement; they had contracted in their own names; the principal for whom they were acting was undisclosed; they were authorized to act as the owners of WNT; or they had an interest in the subject matter of the contract. See City of Houston, 827 S.W.2d at 480 (listing these circumstances as exceptions to rule that agent who contracts on behalf of principal is generally not liable to other contracting parties). Here, there is no

evidence that James and Ramona assumed liability for the agreement. Also, it is undisputed that James and Ramona did not contract in their own names and that the principal for whom they were acting, the estate, was disclosed. Likewise, James and Ramona were not authorized to act as the owners of WNT. James testified that he could not sign the agreement because he was not an officer of WNT and that both he and Ramona knew Rountree would be signing on WNT's behalf because she was an officer. Further, there is no evidence that James and Ramona had an interest in the agreement. They were not shareholders in WNT, and they were not beneficiaries of Tommy's estate.

In addition, Ramona's signing of the shareholders and directors' consent as a director of WNT did not render her personally liable on the agreement. Both the asset acquisition agreement and the commercial lease agreement clearly state that they are between WNT and A&W. Where, as here, a contract clearly shows that the corporation is the contracting party, a corporate officer's signature in her official capacity does not render the contract the officer's personal contract. Robertson v. Bland, 517 S.W.2d 676, 679 (Tex. Civ. App.-Houston [Vt Dist.] 1974, writ dism'd). A corporate officer assumes personal responsibility for a corporate transaction either by adding her responsibility to that of her corporate principal, or by tendering her own responsibility for that of the principal. Austin v. Dunnam & Strong, 761

S.W.2d 115, 116 (Tex. App.-Houston [14" Dist.] 1988, no pet.). In this case, there is no evidence that Ramona assumed personal responsibility for WNT's performance under the asset purchase and commercial lease agreements. Thus, she cannot be held liable for breaching the agreements simply because she consented to them as a director of WNT.

The trial court found that James and Ramona, as the estate's executors, authorized Rountree, or ratified her actions, as WNT's vice president, to execute the asset purchase and commercial lease agreements. The trial court did not, however, find any fact that would render James and Ramona personally liable on the agreements. Accordingly, based on the facts found by the trial court, its conclusions that James and Ramona personally breached the asset acquisition agreement and the obligation to purchase provision in the commercial lease agreement are incorrect. See Forbis, 833 S.W.2d at 319 (holding that conclusions of law may be reviewed to determine their correctness based upon the facts).

C. Fraudulently Caused Breach of Contract Damages

James, Ramona, Goldblatt, George, and Shirley all challenge the trial court's $150,000 breach of contract damages award, contending that they cannot be liable for breach of contract damages because they were not parties to any agreement with A&W. As we have discussed, the trial court's

conclusions that James and Ramona personally breached the asset purchase and commercial lease agreements were erroneous. In addition, the trial court did not find that Goldblatt, George, or Shirley were parties to the agreements or conclude that they breached the agreements.

There is, however, ample evidence to support the trial court's conclusions that the breach of the obligation to purchase provision in the commercial lease agreement resulted from appellants' conspiracy to commit a fraud upon the 48th District Court and that appellants are jointly and severally liable for any damages caused by their conspiracy. We have discussed this evidence at length in addressing appellants' challenges to the trial court's conclusions regarding conspiracy. If appellants had not conspired to commit fraud, the commercial lease agreement would not have been breached, and A&W would not have suffered damages because of the breach.

The trial court's judgment awards A&W $150,000 in damages that were caused by the breach. Findings that the breach and the damages were the direct result of appellants' conspiracy may be implied from the above conclusions and this damages award. See TEX. R. Civ. P. 299 (providing that trial court's findings of fact shall form the basis of its judgment and that, when one or more elements of a ground of recovery have been found by the trial court, omitted, unrequested elements, when supported by the evidence, will be

supplied by presumption in support of the judgment); see also Jefferson County v. Sterk, 830 S.W.2d 260, 262 (Tex. App.-Beaumont 1992, writ denied) (holding that finding that tortfeasor acted knowingly and with conscious indifference, as required for mental anguish damages award, could be implied from trial court's finding of damages for mental anguish); Norwood Bldrs., Inc. v. Toler, 609 S.W.2d 861, 862 (Tex. Civ. App.-Houston [14 Ih Dist.] 1980, writ ref'd n.r.e.) (holding that finding of $20,000 in damages to a $60,000 home would support an implied finding that there was no substantial performance of the contract to build the home). Accordingly, even though James, Ramona, Goldblatt, George, and Shirley were not parties to the commercial lease agreement, the trial court did not err by holding them jointly and severally liable with WNT for the damages A&W suffered as a result of the fraudulently induced breach. We overrule James's,

Ramona's, Goldblatt's, George's, and Shirley's breach of contract and actual damages issues.[14]

VII. Attorney's Fees

The trial court concluded that A&W was "entitled to reasonable and necessary attorneys' fees for legal services rendered ... to enforce the terms of the Commercial Lease Agreement and to defend against the wrongful claims of [appellants] and to respond to appeal." James, Ramona, WNT, George, and Goldblatt assert that the trial court erred in awarding A&W attorney's fees because A&W was not entitled-to attorney's fees on its breach of contract claims. James and Ramona also challenge the legal and factual sufficiency of the evidence to support the amount of attorney's fees as being reasonable and necessary. They further contend, as do WNT, Goldblatt, Indian Villages,

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[14]A&W contends that James should at least be held individually liable for tortious interference with the asset purchase and commercial lease agreements. The trial court did not, however, enter any findings of fact or conclusions of law regarding tortious interference nor does A&W contend that it should have done so. A trial court's judgment may not be supported upon appeal on a theory of recovery no element of which has been included in the findings of fact. TEX. R. Civ. P. 299. Further, omitted findings are only supplied if they are necessary to the judgment. In re Doe, 19 S.W.3d 346, 357 (Tex. 2000). No findings regarding tortious interference are necessary to support the trial court's judgment in this case because the trial court did not conclude that James tortiously interfered with the asset purchase and commercial lease agreements.

George, and Shirley, that A&W was required to segregate the fees expended on its breach of contract claims from those expended on its conspiracy claims.

A. Evidentiary Challenge

James and Ramona do not raise any argument or cite any legal authority to support their evidentiary challenge to the reasonableness and necessity of the attorney's fees, so we will not consider that complaint. See TEX. R. App. P. 38.1 (h) (providing that brief must contain a clear and concise argument for contentions made, with appropriate citations to authorities and the record); Page v. Structural Wood Components, Inc., 57 S.W.3d 524, 532 (Tex. App.-Houston [1411 Dist.) 2001, pet. granted) (holding that appellant waived issue by simply raising it and then failing to present any argument or authority in support of it).

Further, Orson E. Paxton, III, A&W's attorney, testified at trial regarding what are usual and customary attorney's fees in Tarrant County for the services he and the other attorneys in his firm had provided. Paxton also testified that A&W had incurred reasonable and necessary attorney's fees through trial in the amount of $517,159.25. In addition, Paxton testified regarding the additional fees that would be incurred if the case was appealed to the court of appeals and the Texas Supreme Court. None of the appellants challenged the reasonableness or necessity of these fees at trial.

Where the testimony of an interested witness regarding the reasonableness and necessity of attorney's fees is clear, positive, and direct, it is taken as true as a matter of law where, as here, the opposing party had the means and opportunity to disprove the testimony but failed to do so. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990). Testimony concerning usual and customary attorney's fees raises a presumption that the fees are reasonable. Budd v. Gay, 846 S.W.2d 521, 524 (Tex. App. -Houston [141 Dist.] 1993, no pet.). Once unrebutted proof is offered that the attorney's fees are reasonable, the award of attorney's fees is mandatory. Id.; Caldwell & Hurst v. Myers, 714 S.W.2d 63, 65 (Tex. App. -Houston [14th Dist.] 1986, writ ref'd n.r.e.).

B. A&W's Entitlement to Attorney's Fees

The civil practice and remedies code provides that a person may recover attorney's fees from an individual or corporation if the claim is for an oral or written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997). To recover attorney's fees under section 38.001, a party must prevail on a cause of action for which attorney's fees are recoverable and recover damages. Green Intl, Inc. v. Solis, 951 S.W.2d 384, 390 (Tex. 1997). We have upheld the trial court's conclusion that WNT breached its agreements with

A&W.[15] Accordingly, the attorney's fee award for A&W against WNT on this basis is correct. Because the evidence does not, however, support a finding that James and Ramona personally breached the commercial lease agreement, A&W was not entitled to attorney's fees against them based on those claims. See Corporate Leasing Intl, Inc. v. Groves, 925 S.W.2d 734, 739 (Tex. App.-Fort Worth 1996, writ denied) (reversing attorney's fee award where parties should not have prevailed in trial court); Victoria Air Conditioning, Inc. v. S. W Tex. Mechanical Insulation Co., 850 S.W.2d 720, 725-26 (Tex. App. - Corpus Christi 1993, writ denied) (holding that appellant was not entitled to attorney's fees under section 38.001(8) because it did not prevail in trial court or on appeal). We sustain James and Ramona's argument that A&W was not entitled to attorney's fees from them based on its breach of contract claims.[16]

A&W also contends, however, that it was entitled to attorney's fees under the declaratory judgments act. James, Ramona, Goldblatt, and WNT all sought declaratory relief against A&W, primarily in the form of a judgment

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[15]See slip op. at 39-52.

[16]To the extent Goldblatt's complaint is based on A&W's breach of contract claims, it is moot because there is no indication in the record that the fee award against Goldblatt arises from A&W's breach of contract claims.

declaring that the commercial lease agreement was void ab initio based on fraud and failure of consideration. George also sought a declaratory judgment that WNT had breached the settlement agreement set out in the 352nd court agreed judgment. A&W prayed for attorney's fees "pursuant to the declaratory judgment sought" as well as based on breach of contract. None of the above parties prevailed in the above declaratory judgment claims against A&W. To the contrary, A&W prevailed in its defense against these claims. The declaratory judgments act provides that, in a declaratory judgment proceeding, a trial court may award reasonable and necessary attorney's fees as are equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997). Accordingly, the fact that A&W could not recover attorney's fees against James and Ramona based on breach of contract did not preclude it from recovering attorney's fees against James and Ramona, WNT, Goldblatt, and George under the declaratory judgments act.

Goldblatt asserts that he, too, was entitled to attorney's fees under the declaratory judgments act. He points out that the trial court granted him a partial summary judgment on his claim that his foreclosure of the Landmark Life mortgage cut off A&W's right and obligation to purchase the Dawn Lane property. The declaratory judgments act does not require an award of attorney's fees to the prevailing party, but entrusts such awards to the trial

court's sound discretion. Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998); see also TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (providing that trial court may award equitable and just attorney's fees). We hold that the trial court did not abuse its discretion by refusing to award Goldblatt attorney's fees based on his partial summary judgment.

C. Segregation

A party seeking attorney's fees is ordinarily required to segregate the fees incurred on claims that allow recovery of fees from those that do not. Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997); Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10-11 (Tex. 1991). But when the claims are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable, the party suing for attorney's fees may recover the entire amount covering all claims. Aiello, 941 S.W.2d at 73.

In this case, A&W's claims that appellants conspired to defraud the 48th District Court and that James, Ramona, and WNT breached the asset purchase and commercial lease agreements are dependent upon the same complex set of facts and circumstances as James, Ramona, Goldblatt, and WNT's declaratory judgment claims that the commercial lease agreement was void ab initio based on fraud and failure of consideration and George's claims that A&W had breached the settlement agreement in the 352nd court agreed judgment.

As such, all of the parties' claims were inseparably intertwined, and A&W was not required to segregate its attorney's fees expended in successfully defending against the declaratory judgment claims from those expended in enforcing the asset purchase and commercial lease agreements and in prosecuting its conspiracy to defraud claims. Further, Paxton testified on cross-examination that he had not included any fees expended in ancillary proceedings, such as the proceeding, to remove James and Ramona as the estate's executors, the 141st court lawsuit to enjoin Goldblatt from foreclosing on the Dawn Lane property, a suit for breach of the injunction in the 352nd court agreed judgment, and various other proceedings that had been filed in other counties, some of which were later transferred to Tarrant County and included in the underlying proceeding. This evidence supports the trial court's conclusion of law regarding attorney's fees. We overrule appellant's issues regarding attorney's fees.

VIII. Joint and Several Liability

George and Shirley contend that they cannot be jointly and severally liable with the other appellants for A&W's damages because they were not more than 50% responsible for those damages. This argument fails.

In its judgment, the trial court stated that no party was more than 50% responsible for A&W's damages. The current version of the proportionate responsibility statute provides that a defendant is not jointly and severally liable

for tort damages unless the percentage of responsibility attributed to the defendant is greater than 50%. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon 1997). But this version of the statute does not apply to A&W's lawsuit because the lawsuit accrued before September 1, 1995 and was filed in March 1996. Id. § 33.01, historical note (providing that current version of statute does not apply to causes of action that accrued before September 1, 1995 and on which suit was filed before September 1, 1996). Instead, A&W's lawsuit is governed by the version of the statute in effect immediately prior to the 1995 amendments to the statute. Id. The pre-1995 amendment version of the statute provided: "This chapter does not apply to a claim based on an intentional tort or a claim for exemplary damages included in an action to which this chapter otherwise applies." Act of June 3, 1987, 70' Leg., 1" C.S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 41, 41 (amended 1989, 1995, 2001) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (Vernon Supp. 2002)). Because fraud and conspiracy are intentional torts, the version of the proportionality statute that governs A&W's claims does not apply to the trial court's damages award. See Firestone Steel Prods. Co., 927 S.W.2d at 617; Schenck v. Ebby Halliday Real Estate, Inc., 803 S.W.2d 361, 370 (Tex. App.-Fort Worth 1990, no writ). We overrule this argument.

IX. WNT's and Goldblatt's Proposed Findings of Fact and Conclusions of Law

In the trial court, Goldblatt filed 55 pages of proposed findings of fact and conclusions of law, and WNT filed 139 pages of proposed findings and conclusions. Goldblatt and WNT contend that the trial court erred by failing to make the findings and conclusionsthat they requested because the findings and conclusions were supported by the evidence at trial. They ask this court to make the findings and conclusions that the trial court. should have made to establish their claims for relief against A&W, Rountree, Applewhite, and/or Bert George.

Neither Goldblatt nor WNT cites a single record reference or legal authority in support of their contentions. See TEX. R. App. P. 38.1 (h). Moreover, even if these issues were properly briefed, we could not grant the relief Goldblatt and WNT request. Findings of fact are the exclusive province of the fact finder. Bellefonte Underwriters Ins. Co. v. Brown, 704 S.W.2d 742, 744-45 (Tex. 1986). A court of appeals cannot make findings of fact; it can only "unfind" facts. Tex. Natl. Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986). Further, many of the requests for findings and conclusions-such as that the agreements between WNT and A&W were presumptively fraudulent and void ab initio, that appellants committed no conspiracy, and that Goldblatt

is entitled to possession of both WNT's assets and the Dawn Lane property -are contrary to the trial court's conclusions that we have determined are supported by the evidence. Accordingly, Goldblatt and WNT were not entitled to findings and conclusions to the contrary. See, e.g., Levine v, Maverick County Water Control, 884 S.W.2d 790, 796 (Tex. App.-San Antonio 1994, writ denied) (holding that party who obtained some of the findings and conclusions it requested was not harmed by trial court's failure to make additional requested findings and conclusions where those findings were contrary to the findings and conclusions already made by the trial court). Finally, the trial court ruled via pretrial order that WNT had no claims against A&W, Rountree, Applewhite, or Bert George because WNT had irrevocably assigned all of those claims to Goldblatt. WNT does not challenge that pre-trial order here. We overrule Goldblatt's and WNT's issues regarding their proposed findings of fact and conclusions of law.

X. Other Evidentiary Challenges

A. Pretrial Conclusions 1, 2, and 5

The trial court reached certain pretrial conclusions of law, which it incorporated into its findings of fact and conclusions of law. WNT challenges three of them: that the 352nd court agreed judgment did not affect WNT's ability to transfer all of its personal property assets to A&W; that ownership of WNT's personal property was not affected by the 352nd court agreed judgment; and that WNT, James, and Ramona

were estopped from taking positions inconsistent with those that they held in the 352nd court lawsuit. WNT asserts that these conclusions are erroneous because the 48th court judgment is a valid, enforceable final judgment as a matter of law. We reject this circular line of reasoning. The 48th court judgment may have set aside the 352nd court judgment as to the parties involved in the 48th court lawsuit, but it did not dictate the effect of the 352nd court judgment in and of itself.

WNT and George also assert that nothing in the findings of fact or conclusions of law addresses the effect that the 48th court judgment had on the settlement agreement contained in the 352nd court agreed judgment. This argument is beside the point, because regardless of the effect the 48th Court judgment had on the 352nd court judgment, A&W was not bound by the 48th court judgment.[17]

The 48th court lawsuit was a declaratory judgment action in which Shirley, Indian Villages, and the Klutz Trust sought a judgment declaring that WNT, James, and Ramona had breached the settlement agreement in the 352nd court agreed judgment and cancelling the 352nd court judgment's award of the

[17]In its pleadings below, A&W alleged that the trial court had declared the 48th court judgment to be void. We have found no such ruling in the record.

Dawn Lane property and WNT's stock to Tommy's estate. "When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a) (Vernon 1997); accord Tex. Ed. Agency v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994); see also TEX. R. CIV. P. 39(a) (providing that a person who is subject to process shall be joined as a party to the action if he claims an interest relating to the subject of the action and is so situated that the disposition in his absence may impair or impede his ability to protect that interest)

A&W had an interest in the Dawn Lane property as a lessee in lawful possession of the property under the commercial lease agreement. The 352nd court judgment had also cleared the way for the sale of the Dawn Lane property by providing that Shirley, Indian Villages, and the Klutz Trust would release and cancel all their claims to the Dawn Lane property. Thus, as a prospective purchaser under the obligation to purchase provision in the commercial lease agreement, A&W also had an equitable interest in the Dawn Lane property. See, e.g., Johnson v. Wood, 138 Tex. 106, 157 S.W.2d 146, 148 (1941); Guzman v. Acuna, 653 S.W.2d 315, 319 (Tex. App.-San Antonio 1983, writ dism'd) (both stating that a purchaser under a contract of sale who has not paid the purchase price has an equitable right in the property). A&W also certainly

claimed to have interests that would be affected by the declaratory judgment Shirley, Indian Villages, and the Klutz Trust sought, because it was actively attempting to purchase the Dawn Lane property under the commercial lease agreement. Because of these interests, A&W should have been made a party to the 48th court lawsuit.

"A declaration does not prejudice the rights of a person not a party to the proceeding." TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a). Consequently, people are generally not bound by a declaratory judgment rendered in a suit to which they were not parties. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652-53 (Tex. 1996). The doctrine of res judicata creates an exception to this rule by forbidding a second suit arising out of the same subject matter of an earlier suit by those in privity with the parties to the original suit. Id. People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action. Id. at 653; Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 800-01 (Tex. 1992), cert. denied sub nom., Youell & Cos. v. Getty 0# Co., 5 10 U.S. 820 (1993). A&W was not in privity with any of the parties to the 48th court lawsuit. A&W did not control the 48th court suit, its interests certainly were not represented by any party to the 48th court

suit, and it was not a successor in interest to any of the parties to the 48th court suit. Accordingly, A&W was not bound by the 48th court judgment and was not prevented from asserting same in the trial court.

WNT's reliance on Compania Financiara Libano, S.A. v. Simmons, 53 S.W.3d 365 (Tex. 2001) is wholly misplaced. That case involved a suit to enforce terms of a settlement agreement that were not incorporated into an agreed judgment. The supreme court held that settlement terms need not be incorporated into a judgment to be enforceable. Id. at 368. Here, the settlement agreement in the 352nd court lawsuit was incorporated into the 352nd court agreed judgment. In addition, in the 48th court lawsuit, Shirley, Indian Villages, and the Klutz Trust did not seek to enforce the 352nd court settlement agreement or agreed judgment; they sought an order "cancel[l]ing the settlement agreement [and] setting aside and cancelling" the 352nd court judgment. Thus, Compania Financiara Libano is clearly inapposite to this case.

We overrule WNT and George's arguments regarding pretrial conclusions 1, 2, and 5.[18]

WNT also contends that the trial court erred in concluding that the 48th court suit was a collateral attack on the 352nd court agreed judgment. This alleged conclusion is not in the trial court's findings of fact and conclusions of law, so we will not consider WNT's objections to it.

B. Finding of Fact 5

WNT's objections to finding of fact 5 ,are incomplete and therefore difficult to decipher, but WNT seems to challenge the legal sufficiency of the evidence to support the trial court's conclusion that the parties agreed on the $323,000 price that was paid for WNT's assets. James testified, however, that the purchase price for the assets was $323,000. Ramona equivocated

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[18]WNT, Goldblatt, George, and Indian Villages also contend that A&W had no standing to attack the 352nd court and 48th court judgments because A&W was not a party to these lawsuits. Nothing in the record indicates that A&W ever attacked the 352nd court judgment. Additionally, WNT and Goldblatt's arguments concerning the 48th court judgment fail in light of our holding that A&W was not bound by the 48th court judgment. While A&W may not have had standing to challenge the effect of the 48th court judgment on the parties to that lawsuit, it could certainly assert below that it was not bound by the 48th court judgment. The case on which WNT and Goldblatt rely is not on point because it is not a declaratory judgment case and also involved a direct appeal of a judgment by the successor in interest to the judgment debtor. See Gulistan Carpet, Inc. v. Porter, 4 S.W.3d 891, 893 (Tex. App.-Dallas 1999, no pet.). We overrule the no-standing arguments.

about the amount, but she admitted that she signed the asset acquisition agreement, which contained a purchase price of $323,000. This evidence is sufficient to support the trial court's finding.

C. Findings of Fact 9 and 10

WNT challenges the legal and factual sufficiency of the evidence to support the trial court's findings that A&W and WNT entered into the amendment to the asset acquisition agreement on September 11, 1991, that the amendment was enforceable, and that James and Ramona ratified Rountree's signing of the amendment. We have already addressed WNT's no-ratification and presumptive fraud arguments and need not reconsider them here.

Also, WNT once again completely fails to cite any legal authority for its contention that A&W could not have contracted on September 11, 1991 because it was not incorporated until September 24. An agent or the members of an unincorporated association may enter into a contract in the name of a corporation that has not yet been formed. Aloe Ltd., Inc. v. Koch, 733 S.W.2d 364, 366 (Tex. App.-Corpus Christi 1987, no writ). Initially, the agent or members are individually liable for the contract, but once the entity is incorporated and ratifies or derives benefit from the contract, the entity becomes liable for the pre-incorporation acts. Coastal Shutters & Insulation,

Inc. v. Derr, 809 S.W.2d 916, 920 (Tex. App.-Houston [14th Dist.] 1991, no writ); Hutchins v. Grace Tabernacle United Pentecostal Church, 804 S-W.2d 598, 599 (Tex. App.-Houston [1st Dist.] 1991, no writ); Aloe, Ltd., 733 S.W.2d at 366.

In this case, Applewhite and White consented to the asset acquisition agreement on A&W's behalf, and White also signed both that agreement and the amendment. The asset acquisition agreement clearly stated that A&W was not yet incorporated, but would be by the date of closing. A&W was incorporated over a month before the October 28, 1991 closing date. At closing, A&W signed the commercial lease agreement, thereby assenting to it, and also derived benefit from the asset acquisition agreement and the amendment by acquiring WNTs assets and possession of the Dawn Lane property as a lessee. Consequently, we reject WNT's argument.

D. Conclusion of Law 26

WNT asserts that the evidence is factually insufficient to support the trial court's conclusion that the fair market value of the Dawn Lane property during the second half of 1993 was $150,000.[19] The conclusion is supported by the

[19]Goldblatt raises this same argument in his first issue, once again without the benefit of legal authority.

evidence, however. Steven J. Kunkel, an MAI appraiser, valued the property at $150,000 and submitted a report supporting his valuation.

WNT contends that Kunkle's testimony and valuation are not credible evidence because he used inconsistent valuation methods and based his appraisal on properties that were far removed from the Dawn Lane property in both location and characteristics. WNT does not brief these contentions further, but simply refers us to nearly 170 pages of the reporter's record. We are not required to sift through the record, with no guidance from WNT, for evidence that might call Kunkle's valuation methods or his appraisal into question. Harkins v. Dever Nursing Home, 999 S.W.2d 571, 573 (Tex. App.-Houston [14' Dist.] 1999, no pet.); Hafl v. Stephenson, 919 S.W.2d 454, 467 (Tex. App. - Fort Worth 1996, writ denied). Accordingly, we will not consider this argument.

WNT also complains that the trial court improperly disregarded Goldblatt's testimony about the Dawn Lane property's value. Goldblatt testified via a bill of exception that the fair market rental value of the property was $7,500 per month for both the land and building and $5,500 per month for the building only. Conversely, Kunkle testified regarding the fair market sale value of the Dawn Lane property. Assuming that Goldblatt's testimony was admissible, WNT does not explain how it was evidence of the property's sale value.

Further, the trial court, as the trier of fact, was free to believe Kunkle's testimony and disbelieve Goldblatt's. McGalliard, 722 S.W.2d at 697; Akers v. Stevenson, 54 S.W.3d 880, 884 (Tex. App.- Beaumont 2001, pet. denied); Harvey v. Stanley, 803 S.W.2d 721, 724 (Tex. App.-Fort Worth 1990, writ denied).

E. Other Findings and Conclusions

We have addressed the remainder of WNT's challenges to the trial court's findings of fact and conclusions of law in our disposition of WNT's issues concerning fraud, breach of contract, and attorney's fees. We will not revisit them here. We overrule appellants' other evidentiary issues.

XI. Property Pledged to Secure the Landmark Life Note

The trial court concluded: the property pledged to secure the loan from Landmark Life to WNT was adequately described in the deed of trust as the Dawn Lane property and the fixtures affixed thereto; and Goldblatt's foreclosure on the deed of trust lien did not foreclose on any of the nonfixture personal property on the premises at 827 Dawn Lane. Goldblatt challenges these conclusions and asserts that the trial court erred by failing to conclude that the Landmark Life note was secured by both WNT's assets, which had been sold to A&W, and the Dawn Lane property.

The relevant documents are a real estate lien note dated May 1, 1985, made by WNT and payable to Landmark Life Insurance Company and a deed of trust

securing the note. The security for payment is described in the note as:

> A Deed of Trust of even date herewith, executed by the Maker hereof to DANA SMITH, Trustee, upon the following described real property, to-wit:
>
> SEE ATTACHED EXHIBIT "A" WHICH BECOMES A PART HEREOF FOR ALL INTENTS AND PURPOSES,
>
> and by a Security Interest created and granted in said Deed of Trust upon certain other property therein more fully described.
>
> The Exhibit A attached to the note is a metes and bounds description of the Dawn Lane property. The security interest is described in the last paragraph of the deed of trust:
>
> It is understood and agreed that by this instrument Grantors, in addition to fixing and creating a Deed of Trust lien upon and against the real property herein described, inclusive of all goods which are or are to become fixtures thereon, have also created and granted to the Beneficiary pursuant to the Uniform Commercial Code of Texas a security interest in said goods. [Emphasis added.]

Also, the property description attached to the deed of trust lists the metes and bounds description for the Dawn Lane property and is supplemented by the following language:

> and all improvements now ore [sic] hereafter situated thereon inclusive of all goods which are or are to become fixtures, now or hereafter located in and about such improvements, including, without limitation, all heating, air conditioning, ventilating,
>
> plumbing, electrical fixtures and wiring, replacements thereof and additions thereto, all

> of which Grantors represent and agree are and will be a part of and affixed to said land. [Emphasis added.]

This same property description is used to describe the property transferred to Goldblatt under the transfer of lien from Landmark Life.

When construing a contract, a court's primary concern is to give effect to the written expression of the parties' intent. Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994) (op. on reh'g). The contract must be considered as a whole, and no one phrase, sentence, or section should be isolated from its setting and considered apart from the other provisions. Id. at 133-34. In addition, if the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe it as a matter of law. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

The promissory note and deed of trust to Landmark Life and the transfer of lien to Goldblatt are not ambiguous. They clearly state that the only property subject to the deed of trust lien and Landmark Life's security interest is the Dawn Lane property and the fixtures attached thereto. Accordingly, the trial court's conclusions are correct. See Forbis, 833 S.W.2d at 319.

Not satisfied with the property descriptions set out above, Goldblatt urges us to consider "'both pre-mortgage communications between Tom Day and

Landmark and all subsequent writings," as well as a partial excerpt from an undated financing statement and an affidavit tendered by Landmark Life's former president. None of this evidence was admitted by the trial court, however. Instead, it was only offered as a part of Goldblatt's bill of exception. Goldblatt re-offers the evidence here, but cites no argument or legal authority that would explain why the evidence was erroneously excluded below. Consequently, we will not consider it. TEX. R. App. P. 38.1(h). Moreover, absent fraud, accident, or mistake, none of which are at issue here, parol evidence is not admissible to vary the terms of an unambiguous deed of trust or promissory note. Estes v. Republic Natl Bank of Dallas, 462 S-W.2d 273, 276 (Tex. 1970); Tex. Export Dev. Corp. v. Schleder, 519 S.W.2d 134, 137 (Tex. Civ. App.-Dallas 1974, no writ); Lassiter v. Boxwell Bros., Inc., 362 S.W.2d 884, 886 (Tex. Civ. App.-Amarillo 1962, no writ). We overrule Goldblatt's issues concerning the collateral for the Landmark Life note.

XII. Permanent Injunction

The trial court's judgment permanently enjoined appellants

> from directly or indirectly interfering in any way with the business and operation of A&W Industries, Inc., or the real or personal property of A&W Industries, Inc., including the leased property located at 827 Dawn Lane . . . and from pursuing further claims against A&W Industries, Inc., Bert George, Sherry Rountree, John C. Applewhite, or their attorneys, that are in any way related to the

ownership or operation of A&W Industries, Inc. d/b/a Wilbert of North Texas.

Goldblatt asserts that the trial court erred in granting this permanent injunction for numerous reasons. We disagree. First, Goldblatt contends that the injunction improperly fails to identify the reasons for its issuance and the harm A&W will suffer if an injunction is not issued. These requirements, which are from Texas Rule of Civil Procedure 683,[20] only apply to a temporary injunction in which the relief ordered is ancillary to the ultimate relief sought, and not to permanent injunctions. Spinuzzi v. Town of Corinth., 665 S.W.2d 530, 534 (Tex. App.-Fort Worth 1983, no writ); accord Shields v. State, 27 S.W.3d 267, 273 (Tex. App.-Austin 2000, no pet.); Carrell v. Richie, 697 S.W.2d 43, 45-46 (Tex. App.-Austin 1985, writ ref'd n.r.e.). Both of the cases on which Goldblatt relies are temporary injunction cases. See InterFirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640 (Tex. 1986); Fasken v. Darby, 901 S.W.2d 591 (Tex. App.-El Paso 1995, no writ).

Second, Goldblatt contends that the permanent injunction is vague and overbroad. We disagree and question how the injunction could be more clear.

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[20]Inexplicably, Goldblatt also relies on rule 97(d) as support for his argument. TEX. R. CIV. P. 97(d). This rule governs when pleadings may be amended to include counterclaims. Because Goldblatt offers no explanation for his reliance on this rule, we will not consider it.

Goldblatt's complaint about the use of the term "leased premises" is unfounded because that term was used throughout trial to refer to the Dawn Lane property. Goldblatt's complaint that A&W has wrongfully used the injunction to prevent its eviction for refusing to pay post-judgment rent is also without merit. The trial court has ordered A&W to pay $3150 per month for rent of the Dawn Lane property and further ordered that this amount be credited against the judgment debt Goldblatt owes to A&W.

Goldblatt also contends that the trial court erred in granting the injunction because the trial court clerk has not issued a writ in compliance with rule 687. See TEX. R. Civ. P. 687. Nothing in rule 687 requires a trial court clerk to issue a writ of injunction when a permanent injunction is included in a final judgment. Indeed, rule 687 merely sets out the requirements that must be included in a writ. Id. Rule 688 provides that the trial court clerk "shall issue" a writ, but only in the case of a temporary injunction. TEX. R. Civ. P. 688.

Next, Goldblatt asserts that the permanent injunction is improper because "equity cannot be granted to parties who are without clean hands," and the trial court found that A&W did not have clean hands. The trial court made no such finding, although it did orally rule that it would not grant appellees' request for a constructive trust because "there must be clean hands on the part of the

party requesting it." The court was careful to point out, however, that "these are not my formal findings of fact and conclusions of law."

Further, the clean-hands doctrine is not absolute. Vaughan v. Kizer, 400 S.W.2d 586, 590 (Tex. Civ. App.-Waco 1966, writ ref'd n.r.e.). The principle should not be applied when the party relying on it has not been seriously harmed and the wrong complained of can be corrected without applying the doctrine. Thomas v. McNair, 882 S.W.2d 870, 880 (Tex. App.-Corpus Christi 1994, no writ); 1st Coppell Bank v. Smith, 742 S.W.2d 454, 464 (Tex. App.-Dallas 1987, no writ), disapproved on other grounds, Fortune Prods. Co. v. Conoco, Inc. 52 S.W.3d 671, 678 (Tex. 2000). In this case, Goldblatt complains of no "wrong" except that A&W has refused to pay rent-an argument we have previously rejected.

Goldblatt also contends that a trial court cannot issue an injunction to prevent an eviction suit. Neither of the cases on which he relies is on point, however, because they did not involve a situation in which the party sought to be evicted had been fraudulently deprived of its contractual right to purchase the subject property. See generally Haith v. Drake, 596 S.W.2d 194 (Tex. Civ. App. - Houston [11 Dist.] 1980, writ ref'd n.r.e.); Pruett v. Triton, 124 S.W.2d 868 (Tex. Civ. App. -Galveston 1938, writ dism'd). In this case, the trial court ruled by partial summary judgment that Goldblatt's foreclosure of the Landmark

Life mortgage in June 1994 cut off both A&W's right and obligation to purchase the Dawn Lane property,[21] and A&W has conceded that Goldblatt is the record owner of that property. But the trial court also concluded that Goldblatt's purchase of the Landmark Life note and subsequent foreclosure on the Dawn Lane property was the result of appellants' conspiracy to fraudulently deprive A&W of its right to purchase the property and that the foreclosure wrongfully deprived A&W of this right. We have upheld these conclusions;[22] therefore, this argument also fails.

Goldblatt's last argument under this issue is that the injunction violates his constitutional right to occupy the Dawn Lane property as his business homestead. Goldblatt did not attempt to designate the Dawn Lane property as his business homestead until June 5, 2000. We apply the homestead provisions in effect at the time of his application. In 1999, our constitution was amended to provide that a place or business in a city cannot be designated as a business homestead unless it is part of a ten-acre or less tract of land that

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[21]Without the benefit of legal authority, Shirley argues from this ruling that "'the purchase of the note and foreclosure were entirely proper proceedings.'" We reject this argument because it is not briefed, TEX. R. APP. P. 38.1 (h), and nothing in the record or the trial court's conclusions supports it.

[22]See slip op. at 26-35, 37.

also includes the owner's home. TEX. CONST. art. 16, § 51 (amended 1999).[23] The Dawn Lane property is in Grapevine, and Goldblatt has resided for years in his home at 3605 Wharton Drive in Fort Worth. Consequently, Goldblatt could not designate the Dawn Lane property as his business homestead.

We hold that the trial court did not abuse its discretion by granting the permanent injunction in its judgment.[24] We overrule Goldblatt's arguments concerning the permanent injunction.

XIII. Legal Justification

Indian Villages asserts that the trial court erred in failing to find that Indian Villages was legally justified in participating in the 48th court lawsuit and in the May 1994 agreement. Indian Villages does not, however, direct us to any place in the record where it requested such findings. As we have previously noted, findings of fact are the exclusive province of the fact finder, not an appellate court. Tex. Nat'l Bank, 717 S.W.2d at 903; Bellefonte

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[23]T1he homestead in a city ... shall consist of [a] lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, that the homestead in a city ... shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business . . . ." Id.

[24]The grant or denial of a permanent injunction is reviewed under an abuse of discretion standard. Operation Rescue-Natl v. Planned Parenthood of Houston, 975 S.W.2d 546, 560 (Tex. 1998); El Paso County Hosp. Dist. v. Gilbert, 64 S.W.3d 200, 203 (Tex. App.-El Paso 2001, pet. filed).

Underwriters Ins. Co., 704 S.W.2d at 744-45. Moreover, Indian Villages' contention that it was legally justified in its actions is contrary to the trial court's conclusions regarding conspiracy that we have determined are supported by the evidence. Accordingly, Indian Villages was not entitled to findings and conclusions to the contrary. See Levine, 884 S.W.2d at 796. We overrule this argument.

XIV. Statute of Limitations

George contends that A&W's claims against him are barred by the statute of limitations and that A&W failed to use due diligence in serving him. George also complains that the trial court erred by excluding evidence relevant to his statute of limitations defense.

A&W added George as a defendant in June 1997. George asserts that a fair reading of A&W's pleadings shows that his involvement in a conspiracy to commit fraud occurred no later than May 30, 1994, the date he entered into his agreement with Goldblatt. George further contends that the statute of limitations for civil conspiracy is two years, so A&W's 1997 claims against him were time-barred.

The civil practice and remedies code provides that a person must bring suit for personal injury not later than two years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp.

2002). Based on this section, several Texas courts have held that the statute of limitations for fraud-related conspiracy claims is two years. See, e.g., Mayes v. Stewart, 11 S.W.3d 440, 452-53 (Tex. App. - Houston [14th Dist.] 2000, pet. denied); Chandler v. Chandler, 991 S.W. 2d 367, 394 (Tex. App. - El Paso 1999, pet. denied), cert. denied, 529 U.S. 1054 (2000); In re Estate of Herring, 970 S.W.2d 583, 586 (Tex. App.- Corpus Christi 1998, no pet.); Fisher v. Yates, 953 S.W.2d 370, 381 (Tex. App.-Texarkana 1997), writ denied, 988 S.W.2d 730 (1998); Allen v. City of Midlothian, 927 S.W.2d 316, 322 (Tex. App. -Waco 1996, no writ). Because the statute of limitations for fraud is four years, however, A&W contends that the statute of limitations for conspiracy to commit fraud should also be four years. TEX. CIV. PRAC. & REM. CODE ANN. 16.004(a)(4) (Vernon Supp. 2002); Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990) (op. on reh'g).[25]

Regardless of whether a two-year or four-year statute of limitations applies, A&W is not barred from recovering against George. Subsumed within the trial court's conclusions that appellants conspired to commit fraud and, as a result, wrongfully deprived A&W of its right to purchase the Dawn Lane

[25] Although the discovery rule applies to conspiracy to commit fraud, A&W does not contend that the discovery rule applies here. Estate of Herring, 970 S.W.2d at 586.

property is an implied finding that appellants, including George, committed fraud. See, e.g., Jefferson County, 830 S.W.2d at 262 (holding that findings that tortfeasor acted knowingly and with conscious indifference could be implied from trial court's award of mental anguish damages). This finding is sufficient to support the trial court's damages award against George. See Mayes, 11 S.W.3d at 453 (holding that, even if plaintiff's claim for conspiracy was time-barred, jury finding of fraud still supported damages award). We overrule this argument.

George also asserts that he was not served until March 1999, and that the trial court improperly refused to admit his evidence to establish this fact. George attempted to call A&W's attorney, Orsen Paxton, III as a witness on the statute of limitations and service of citation issues. The trial court refused to allow Paxton to testify because George had not timely designated Paxton as a witness. On appeal, George does not cite any legal authority to support his contentions that this ruling was erroneous or that the delay in service of process prevented A&W from prosecuting its claims against him. Babcock v. Northwest Memorial Hospital, the only case George cites, deals with limitation of voir dire, not witness designation, offers of proof, or due diligence. 767 S.W.2d 705, 708 (Tex. 1989) (op. on reh'g) Accordingly, we will not consider these arguments. TEX. R. App. P. 38.1 N.

XV. Conclusion

Having disposed of all of appellants' issues on appeal, we affirm the trial court's judgment.

TERRIE LIVINGSTON
JUSTICE

PANEL B: DAY, LIVINGSTON, and GARDNER, JJ.

DO NOT PUBLISH
TEX. R. App. P. 47.3(a)

JUL 18 2002

APPENDIX H

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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May 15, 2003

Mr. Keith Woodley
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Mr. Paul Wieneskie
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RE: Case Number 02-1088
Court of Appeals Number: 02-00-00243-CV
Trial Court Number: 90-1522-C-2

Style: Indian Villages, Inc., Kenn Goldblatt, Wilbert of North Texas, Inc.
v.
A&W Industries, Inc.

Dear Counsel:

Today the Supreme Court of Texas denied both motions for rehearing in the above styled petitions for review.

Sincerely,

Andrew Weber, Clerk

by _____
Jessica L. Vlasac, Deputy

cc: Ms. Suzanne Henderson
Ms. Stephanie Lavake, Clerk
George A. Day